2014 WL 9911051 (Kan.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)
District Court of Kansas.
Eighteenth Judicial District
Civil Department
Sedgwick County

Byron T. WIECHMAN, Plaintiff,

v.

BENCHMARK INSURANCE COMPANY, Claims Professionals, Inc., and Mark Huddleston, Defendants.

No. 2013CV000731.
August 4, 2014.

Plaintiff's Reply to the Memorandum of the Insurance Companies Opposing Summary Judgment for Plaintiff

Robert (Rocky) D. Wiechman, Jr., 727 North Waco, Suite 278, Wichita, KS 67203, (316) 264-2115.

Ron D. Beal #11635, 9927 Redbud Lane, Lenexa, Kansas 66220, (913) 940-7607, for plaintiff Byron T. Wiechman.

Plaintiff seeks summary judgment for the $25,000 amount provided in a written settlement agreement, plus prejudgment interest. In July 2013, plaintiff timely served a motion for summary judgment. Defendants Benchmark Insurance Company and Claims Professionals, Inc. ("CPI") (hereinafter collectively "the Insurance Companies") have filed a response. In their response, the Insurance Companies no longer contest the existence of the settlement agreement. Instead, they make five arguments in an effort to avoid summary judgment.

First, they argue the settlement amount to which the parties agreed was only $17,864.85, not the $25,000 amount set forth in the Release. "*Response of Defendants Benchmark Insurance Company and Claims Professionals, Inc. To Plaintiff's Motion For Partial Summary Judgment*" (hereinafter "*Response*"), pp. 25-31. They allege the $17,864.85 amount was verbally agreed to during a telephone conversation between Michelle Avery ("Avery") and Mr. Robert (Rocky) D. Wiechman, Jr. held on March 11, 2008 — the day before Avery wrote to Mr. Wiechman stating that "[u]pon receipt of the properly executed release, *we will issue payment in the amount of $25,000* and consider the matter resolved;" the day before Avery sent to Mr. Wiechman the Release which promised that payment to plaintiff of $25,000 "*will be forthcoming*." However, the Insurance Companies have failed to come forward with evidence of a verbal agreement on the payment term. To the contrary, defendants' own records show there was no such verbal agreement. Avery recorded the telephone conversation of March 11, 2008, in the Claim Activity Report of the Insurance Companies — a report which the Insurance Companies admit contains "anything that transpired in the course of the claim, a running time line of everything done in the claims systemy(3)27." The report shows that Avery did not offer a payment of $17,864.85, and that Mr. Wiechman did not accept an offer to pay only $17,864,85. Moreover, defendants' own records show that it was the following day — March 12, 2008 — when Avery received approval from her supervisor to make a settlement offer. The evidence shows no "meeting of the minds" to pay only $17,864.85 - no outward manifestation or expression of assent on the part of defendants to pay $17,864.85, and no outward manifestation or expression of assent on the part of plaintiff to accept payment of $17,864.85 instead of the $25,000 amount offered on March 12, 2008. Rather, the evidence shows mutual outward manifestations and expressions of assent to pay $25,000 to plaintiff. Defendants have fabricated the "verbal agreement" allegation to avoid responsibility for their written agreement to pay $25,000 to plaintiff. *See infra*, pp. 29-42.

Second, the Insurance Companies argue plaintiffs claim is barred by the three year statute of limitations. *Response*, pp. 31-33. Their argument relies on the same fictitious verbal agreement on which they rely to evade responsibility for paying $25,000. They argue that, because the payment term of $17,864.85 was verbal instead of written, the three-year statute of limitations applies instead of the five year statute of limitations. However, the evidence shows no "meeting of the minds" to pay only

$17,864.85 — no outward manifestation or expression of assent on the part of defendants to pay $17,864.85, and no outward manifestation or expression of assent on the part of plaintiff to accept payment of $17,864.85 instead of the $25,000 amount

PLAINTIFF'S REPLY TO THE MEMORANDUM OF THE INSURANCE COMPANIES OPPOSING SUMMARY JUDGMENT FOR PLAINTIFF

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Third, the Insurance Companies argue plaintiff's claim is barred by the affirmative defense of laches notwithstanding that a statute of limitations applies. *Response*, pp. 36-43. However, because a statute of limitations applies, under Kansas law, laches does not apply, Moreover, the Insurance Companies have failed to come forward with evidence showing the existence of the essential elements of laches. *See infra*, pp. 44-59.

Fourth, the Insurance Companies attempt to persuade the Court that they cannot be bound by their own settlement agreement, even though freely and voluntarily entered, if the total aggregate amount of the settlement plus a payment on a subrogation demand exceeds the limits of the insurance agreement. *Response*, pp. 33-36. However, like everyone else, insurance companies

can and are bound by settlement agreements into which they freely and voluntarily enter; it makes no difference that the total aggregate amount of the settlement exceeds the limits of the insurance agreement. *See infra*, pp. 59-62.

Fifth, the Insurance Companies argue that prejudgment interest should not be awarded; they falsely state that the purpose of this lawsuit was to determine how much was owed. *Response*, pp. 43-46. Prior to plaintiff's motion for summary judgment, defendants disputed even the existence of a settlement agreement, and asserted many affirmative defenses, some of which they continue to assert. Moreover, the amount owed is liquidated and has been since August 26, 2008. The payment term in the written settlement agreement is clear and unambiguous — $25,000. Declining to award prejudgment interest would license insurance companies to refuse to honor settlement agreements into which they freely and voluntarily enter so they can use the settlement proceeds without risk of paying interest. *See infra*, pp. 62-65.

THE INSURANCE COMPANIES' SO-CALLED "NATURE OF CASE"

The Insurance Companies begin with five pages of unsupported factual allegations in a section called "Nature of Case." Kansas Supreme Court Rule 141 provides for no such section. Plaintiff objects to that section and requests that it be ignored.

The "Nature of Case" section includes some references to the record purportedly supporting certain factual contentions. However, the evidentiary references do not support the contentions. For example, on page 3, the Insurance Companies reference page 41 of their Exhibit K [1] (Mr. Wiechman's deposition transcript) to support the allegation that Avery and Mr. Wiechman "had a telephone call on March 11, 2008 ... in which, according to his deposition testimony, they settled the case for $25,000 (Ex. K, p. 41)." The referenced deposition testimony does not support the allegation that they verbally "settled the case for $25,000." Rather, in the referenced deposition testimony, Mr. Wiechman testified that Avery "said they were going to offer $25,000 to my client and would send a release which he needed to sign and send back to them, and the case would be over," *Response Exh*. K, p. 41/15-18.

PLAINTIFF'S UNCONTROVERTED STATEMENTS OF FACT

Plaintiff set forth 38 separately numbered paragraphs containing statements of fact supported by reference to Exhibits 1-34. Under Kansas law, "[w]hen opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact." *Shamberg, Johnson & Bergman, Chid v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009). Defendants have failed to come forward with evidence establishing a genuine issue of material fact, so summary judgment should be entered for plaintiff.

A memorandum opposing a motion for summary judgment must state - in separately numbered paragraphs that correspond to the numbered paragraphs of the movant's memorandum — whether each of the factual contentions are uncontroverted, uncontroverted for purposes of the motion only, or controverted. Kan.Sup.Ct. Rule 141(b)(1). Kansas Supreme Court Rule 141(b)(1) permits those three, and only those three, types of responses. If controverted, the response must concisely summarize conflicting testimony or evidence and provide precise references to pages, lines and/or paragraphs of the portion of the record on which the non-movant relies to controvert the contention. Kan. Sup. Ct. Rule 141(b)(1)(C).

The memorandum of the Insurance Companies expressly states "uncontroverted" to each of the following numbered paragraphs: 1-3, 10, 12, 14-18, 20-23, 35.

In response to certain numbered paragraphs, the Insurance Companies fail to comply with Rule 141(b)(1). With respect to numbered paragraphs 4, 6-9, 11, 19, 24, 28 and 36, the Insurance Companies state "uncontroverted," but improperly attempt to limit the scope of their response or improperly add collateral remarks (which are not material), all without ever stating "controverted" as required by Rule 141(b)(1), and without referencing pages, lines and/or paragraphs of the record which

supposedly supports the collateral remarks. Accordingly, those numbered paragraphs are uncontroverted and the collateral remarks should be ignored.

The Insurance Companies expressly state "controverted" to the following numbered paragraphs: 5, 13, 25-27, 29-34 and 37. However, in almost each and every instance, the Insurance Companies both fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record. In the one instance in which the Insurance Companies do reference evidence which controverts a factual statement (pertaining to service of process in the Personal Injury Lawsuit), the statement is not material under the governing substantive law, so summary judgment for plaintiff if not precluded.

The five arguments raised by the Insurance Companies do not preclude the entry of summary judgment for plaintiff and against the defendants because the Insurance Companies —

1. have failed to come forward with evidence controverting the fact that the payment term under the settlement agreement was $25,000, not $17,864.85;

2. have failed to come forward with evidence that the payment term of $25,000 was in writing, thereby failing to support their statute of limitations argument;

3. have failed to show that laches applies notwithstanding the existence of an applicable statute of limitations, and have failed to come forward with evidence to support each essential element of laches;

4. have failed to show that insurance companies are not bound by settlement agreements into which they freely and voluntarily enter; and

5. have failed to come forward with evidence controverting the fact that plaintiff is entitled to prejudgment interest on the liquidated debt of $25,000.

Paragraph 5 contains three sentences. The Insurance Companies do not attempt to controvert the first sentence. The second and third sentences say that, in the Personal Injury Lawsuit,

"[o]n December 18, 2007, defendant Huddleston was personally served with alias summons and the petition by Mr. Wiechman. *Exhibit* 6, ¶¶1-6; *Exhibit* 7. The return on service was filed December 28, 2008 [sic]."

The Return On Service Of Summons mistakenly says that Mr. Robert D. (Rocky) Wiechman hand-delivered the alias summons and petition to Huddleston at 2355 "**West**" Pawnee, #204, Wichita. *Exhibit* 7; *Exhibit* 51, ¶3. It should say Mr. Wiechman hand-delivered the alias summons and petition to Huddleston at 2355 "**East**" Pawnee, #204, Wichita. *Exhibit* 51, ¶3. Indeed, page 22 of defendants' 54 page Claim Activity Report contains an entry, on June 19, 2006, stating that Iris Smith, Huddleston's mother, moved to "2355 E Pawnee, Apt. 204." *Response Exh*. L, p. 22 (emphasis added),

Paragraph 6 contains two sentences. The Insurance Companies state "uncontroverted" as to certain matters. They fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

Paragraph 7 contains one sentence. The Insurance Companies state "uncontroverted per Ex. 8." They fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

Paragraph 8 contains one sentence. The Insurance Companies state "uncontroverted per Ex. 10." They fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

Paragraph 9 contains one sentence. The Insurance Companies state "uncontroverted." They fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

Paragraph 11 contains one sentence. The Insurance Companies state "uncontroverted." They fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

Paragraph 13 states that

"[o]n March 12, 2008, defendant CPI, on behalf of defendant Benchmark Insurance and defendant Huddleston, made a settlement offer to Robert D. Wiechman, Jr., plaintiffs attorney as set forth in the letter from Avery to plaintiffs attorney, dated March 12, 2008. *Exhibit* 14; *Exhibits* 1-3, ¶¶12-14, ¶16; *Exhibit 4*, ¶¶12-14, ¶16."

The Insurance Companies state "controverted," but fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

Plaintiff's Exhibit 4, to which the Insurance Companies reference, does not support their allegation. The letter of March 12, 2008, does not state that an "oral agreement to settle was made in a telephone conversation ..." To the contrary, that letter included the proposed Release of All Claims, and stated that "[u]pon receipt of the properly executed release, we will issue payment in the amount of $25,000.00 and consider the matter resolved." *See Exhibit* 14.

Paragraph 19 contains one sentence. The Insurance Companies states "uncontroverted," and incorrectly allege that, in his letter to State Farm of July 21, 2008, Mr. Wiechman "acknowledged his awareness that State Farm may have PIP subrogation rightsy(3)27." The Insurance Companies are trying to mislead the Court, The letter does not even pertain to "PIP" subrogation. The letter states that "[p]ursuant to K.S.A. 40-284(1), State Farm shall have subrogation rights" under Kansas law. *Plaintiff's Exhibit* 17, p. 1. The statute — K.S.A. 40-284 — pertains to the subrogation rights of an underinsured motorist coverage insurer; it does not pertain to PIP subrogation rights. The letter has nothing to do with "PIP" subrogation.

Paragraph 24 contains one sentence and references' formal admissions and Hummer's letter in support. The Insurance Companies state "uncontroverted" and fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

The Insurance Companies fail in their attempt to deny "that the selected portions quoted in this [statement of] fact are supported by [Hummer's] letter as a whole." Whatever that means. The Insurance Companies make no effort whatsoever to show that the letter "as a whole" somehow lessens Hummer's admission that plaintiff accepted defendants' offer on August 26.

Contrary to the unsupported remark of the Insurance Companies, Hummer's letter is evidence, and Hummer's admission that defendants' settlement offer was accepted by Mr. Wiechman on August 26 is relevant. It is additional evidence that there was no verbal agreement preceding August 26, In fact, in response to Plaintiff's Motion For Summary Judgment, the Insurance Companies cite to and quote extensively from Hummer's letter. *Response*, p. 2.

Paragraph 25 states that

"[d]uring a telephone conversation with Avery after August 27, 2008, after learning that defendants would not pay $25,000, Mr. Wiechman stated he would sue. *Exhibit* 6, ¶19; *Exhibit* 8, p. 44."

The Insurance Companies state "controverted," but they fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

Plaintiff's Exhibit 8, to which the Insurance Companies reference, is the Claim Activity Report which contains an entry on page 44 for October 1, 2008, stating that, on September 26, 2008, Mr. Wiechman "further states if we do not issue pymt to him in the amount of $25X he will suey(3)27." The statement of fact is accurate.

Paragraph 26 states that

"[d]uring a telephone conversation with Avery in October 2008, Mr. Wiechman stated he would file suit. *Exhibit* 6, ¶20; *Exhibit* 8, p. 45."

The Insurance Companies state "controverted as vague," but they fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record. There is nothing "vague" about the statement of fact; its accurate and not controverted.

Plaintiff's Exhibit 8, to which the Insurance Companies reference, is the Claim Activity Report which contains an entry at page 45 for October 16, 2008, that Mr. Wiechman "contends the letter did not state this, therefore, he will file suit against Benchmark and up." The statement of fact is accurate and not controverted.

Paragraph 27 states that

"[d]uring a telephone conversation with Avery in 2009, Mr. Wiechman stated he would file suit for defendants' refusal to honor their agreement. *Exhibit* 6, ¶21; *Exhibit* 8, p. 46."

The Insurance Companies state "controverted." but they 'fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

Plaintiff's Exhibit 6 is the declaration of Mr. Wiechman affirming to the truth of the factual statement, and Plaintiff's Exhibit 8 is the Claim Activity Report which contains an entry at page 46 for February 25, 2009. that Mr. Wiechman "is filing suit against the ins co for failing to honor our agreement." The statement of fact is accurate and not controverted.

Paragraph 28 contains one sentence. The Insurance Companies state "incontroverted" and fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

Paragraph 29 states that

"In their answer, defendants alleged plaintiff's claims are barred by the three-year statute of limitations. Answer ¶7. In interrogatories, defendants were asked to "[f]ully disclose all information on which you rely or which you consider significant for contending that the applicable statute of limitations is three years." *Exhibits* 30-32, No. 9. Defendants asserted the contract "did not contain all the material terms," but defendants did not identify a single material term that is not in writing. *Exhibit* 33, No. 9."

The Insurance Companies state "controverted," but they fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

Paragraph 30 states that

"In their answer, defendants allege "mistake as to the amount of the settlement.y(3)27" *Defendants' Answer*, ¶8. Interrogatories to defendants included the following: "[i]n your Answer, you allege that plaintiff's claims are barred by mistake as to the amount of the settlement. Fully disclose all information on which you rely or which you consider significant for your allegation."

Exhibits 30-32, No. 13. Defendants did not set forth information sufficient to support its allegation of a belief the settlement amount was anything other than $25,000. *Exhibit* 33, No. 13."

The Insurance Companies state "controverted," but they fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

Paragraph 31 states that

"Prior to September 5, 2008, neither plaintiff nor his attorney believed or was aware that defendants supposedly believed the settlement amount was $17,846.85. *Exhibit* 6, ¶17."

The Insurance Companies state "controverted," but they fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

Plaintiff's Exhibit 6 is the declaration of Mr. Wiechman, and paragraph 17 affirms to the truth of the factual statement. The statement of fact is accurate. The Insurance Companies state "controverted," but they neither controvert the factual statement nor proffer evidence to controvert the statement.

Paragraph 32 states that

"Prior to September 2008, neither plaintiff nor his attorney believed or was aware that defendant CPI had paid $7,135.15 to State Farm. *Exhibit* 6, ¶18."

The Insurance Companies state "controverted," but they fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

The Insurance Companies incorrectly allege that Plaintiff's Exhibit 6 is a letter. Plaintiff's Exhibit 6 is the declaration of Mr. Wiechman affirming to the truth of the factual statement.

Paragraph 33 states that

"On October 1, 2008, in an entry in the Activity Report following her meeting with Gragson, Avery states that "[t]he release in essence is correct." *Exhibit* 8, p. 44."

The Insurance Companies state "controverted," but they fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

The Insurance Companies say the entry on page 44 of the Claim Activity Report "does not reference Gragson at all,y(3)27" This allegation is false and misleading. The entry says "Discussed with mgmt." *Exhibit* 8, p. 44." Gragson testified "[t]hat would have been me. *Exhibit* 52, p, 147/10-23. The Insurance Companies neither controvert nor proffer evidence to controvert the factual statement. The statement of fact is accurate and uncontroverted.

Paragraph 34 states that

"In a letter to Mr. Wiechman in January 2009, Avery used the phrase "the remaining balance of our insured's policy limit" to mean $17,846.85. *Exhibit* 23 [sic]."

The statement contains a typo. The letter to Mr. Wiechman in January 2009 is Plaintiff's Exhibit 25, not Plaintiff's Exhibit 23. This correction overcomes the challenge to the statement of fact.

Paragraph 36 contains one sentence. The Insurance Companies state "uncontroverted" and fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

Paragraph 37 states that

"Mr. Wiechman handled the settlement of the Personal Injury Lawsuit and was likely to be a witness in this case; therefore, he could not try the case for plaintiff. Mr. Wiechman's substitute attorney-of-choice was Ron D. Beal, with whom Mr. Wiechman has worked on many cases since the early 1990s. From October 2007 to early 2013, Mr. Beal was involved in a $34 million legal malpractice lawsuit filed in Butler County, Kansas, representing three former stockholders, directors and officers of a Kansas Corporation against a large Kansas City law firm and two of its lawyers. He did not become available to represent plaintiff until the beginning of this year, accounting for the filing of the action in early March of this year. *Exhibit* 6, ¶23."

The Insurance Companies state "controverted," but they fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

The Insurance Companies reference pages 73-76 of the deposition transcript of Mr. Wiechman, but those passages do not support the allegations they make in response to plaintiff's statement of fact. Rather, the testimony on those pages is as follows:

a. on September 26, 2008, and again in October 2008, Mr. Wiechman told Avery he was going to sue the insurance company, *Resp. Exh*. K, p. 73/12-17;

b. there was a possibility of Mr. Wiechman being a witness in the case and his attorney of choice and plaintiff's attorney of choice was Mr. Ron Beal, who was involved in a major malpractice lawsuit against a Kansas City law firm in Butler County, *Id.* at 73/18-74/11;

c. Mr. Beal informed Mr. Wiechman he was unable to take this case, and it was not until March 2013 that he was free to take this case, *Id.* at 74/6-9;

d. other Wichita lawyers would not have represented plaintiff to the extent and capability of Mr. Beal, *Id.* at 74/12-18;

e. there were no lawyers in Wichita during the two years after September 2008 that Mr. Wiechman felt were capable of filing and pursuing competently a contract action against defendants to the extent and capability and competence of Mr. Beal, *Id.* At 75/17-23;

f. Mr. Wiechman's preference was to have Mr. Beal and Mr. Beal alone handle the case, *Id.* at 75/24 - 76/3;

g. this case was not filed earlier because Mr. Beal was not available yet, *Id.* at 76/7-9;

h. Mr. Wiechman did not file within a couple of years of September 2008 because he knew he had to get Mr. Beal involved shortly after filing, and Mr. Beal was unavailable, *Id.* at 76/16-19.

Paragraph 38 is two sentences supported by reference to the declaration of Mr. Wiechman. The Insurance Companies fail to concisely summarize allegedly conflicting evidence, and fail to reference pages, lines and/or paragraphs of the conflicting record.

The Insurance Companies "object" to the factual statement. This is improper. Rule 141(b) makes no provision for objections. *See Connor v. Occidental Fire & Cas. Co.*, 281 Kan. 875, 882, 135 P.3d 1230 (2006) (concluding that insurer's general statements

disputing relevance of evidence cited in insured's summary judgment motion did not comply with Rule 141(b)); *Hammig v. Ford*, 246 Kan. 70, 75, 785 P.2d 977 (1990)

Moreover, the factual statement is neither argumentative nor a legal conclusion. Also, Mr. Wiechman is the attorney who represented plaintiff in the Personal Injury Lawsuit, and is in a position to testify as to the factual statement.

RESPONSE TO THE CONTENTIONS OF "FACT" OF THE INSURANCE COMPANIES

On pages 11 to 25 of the memorandum, the Insurance Companies set forth in separate paragraphs, numbered 39 to 157, certain contentions of "fact." Some contentions accurately reference the record evidence, but they are not material under the governing substantive law, so they do not prevent the entry of summary judgment for plaintiff. *See Mitchell v. City of Wichita*, 270 Kan. 56, 59, 12 P.3d 402 (2000)("An issue of fact is not genuine unless it has legal controlling force as to the controlling issue. The disputed question of fact which is immaterial to the issue does not preclude summary judgment. If the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of material fact.").

Many of the contentions of the Insurance Companies are not material, and misstate both the referenced record and the facts. This section specifies the numbered paragraphs which misstate the referenced record and the facts. The following separately numbered paragraphs correspond to the numbered paragraphs in the memorandum of the Insurance Companies, beginning with numbered paragraph 39.

39. The referenced evidence does not support the contention that plaintiffs breach of contract action alleged a written contract to pay him "the policy limitsy(3)27 of the auto liability policy." The referenced evidence shows an action for breach of a settlement agreement independent of what the policy limits may have been. *Response Exh*. G.

49. The contention misstates the referenced evidence and the evidentiary record. Gragson testified Avery was located in California. *Response Exh*. M, ¶3; *Ins. Cos. Exh*. S, p. 58/6-9. The affidavit of Colleen Loeffelbein, the legal assistant for Frank Hummer, the attorney for all defendants at the time, states that Loeffelbein contacted Avery and Avery stated she lives in California. *Response Exh*. N, ¶3. In answer to interrogatories, defendants admitted that Avery "has moved to California .." *Plaintiff's Exhibits*[2] 30-32, No. 12; *Plaintiff's Exhibit* 33, p. 5, No. 12 (Avery "has moved to California").

Nevertheless, the "investigators" hired by defendants to find Avery avoided looking for her in California; they looked for her in Missouri and Oklahoma instead, and they spent little time doing so. Exhibit A attached to *Defendant's Exh*. D; Attachment to *Defendant's Exh*. E.

Also, in response to interrogatories on their defense of laches, defendants did not say Avery had not been located and did not say Avery could not be located. *Plaintiffs Exhibits* 30-32, No. 12; *Plaintiff's Exhibit* 33, p. 5, No. 12. To the contrary, defendants conceded she could be located by complaining of "the additional expense of finding her and traveling to take her deposition y(3)27" *Plaintiff's Exhibit* 33, p. 5, No. 12.

55. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention of the existence of a letter from CPI of July 10 or that Mr. Wiechman admitted having CPI's letter of July 10 to Plaintiff.

56. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention that the letter described "the PIP lieny(3)27." The letters of June 20, July 20 and August 22 neither describe, nor mention nor assert a "PIP lien." *See Response Exhs*. P, Q and S.

61. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention. The evidence of record shows that CPI received responses from Mr. Wiechman. For

example, there was a letter from Mr. Wiechman dated August 11, 2006. *Response Exh*. R. In the letter, Mr. Wiechman informs defendants that he represented plaintiff: “My Client Byron Wiechman.” *Id.*

63. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention that the bills and records contained In the settlement brochure “showed on their face that State Farm had paid them.” The three bills make no such showing, and the Statement Of Account shows a State Farm payment of only $5,450.25 with a note of “PIP Exhausted State Farm.” *Response Exh*. W.

64. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention. In a letter from Mr. Wiechman to CPI, dated August 11, 2006, Mr. Wiechman informed defendants that he represented plaintiff: “My Client Byron Wiechman.” *Response Exh*. R. Entries in defendants' Claim Activity Record preceding February 2008 repeatedly refer to Mr. Wiechman as the claimant's attorney. *See e.g., Response Exh*. L, p. 36 (12/27/07 “Call clmnt's atty”); p. 35 (10/26/07 “clmt has an atty”); p. 34 (10/25/07 “Clmt represented by atty”); p. 33 (10/25/07 “Called clmt's atty 316-264-2155. Mr. Wiechman was no court.”).

66. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention. The insurance policy does not say that a payment by *CPI* reduces the policy limits. *Response Exh*. H

67. The referenced evidence does not support the identification of Gragson deposition exhibit 20.

68. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention. Exhibit 23 to Gragson's deposition was identified by Gragson as a two page exhibit. *Plaintiff's Exhibit* 35, pp. 137/4 - 138/17, and two attachments. The first page is the letter from Mr. Wiechman to CPI, dated August 26, 2008, stating that the release was signed, notarized and enclosed. *Id.* The second page is the Release of all Claims, properly signed and notarized, promising that payment of $25,000 “will be forthcoming.” *Id.*

69. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention. The referenced evidence is an entry, on October 1, 2008, in the Claims Activity Report, of a telephone conversation Avery had with Mr. Wiechman five days earlier, on September 26, 2008. *Response Exh*. L, p. 44. The entry says Mr. Wiechman advised Avery that the letter of March 12, 2008, “indicates we would issue pymt to him in the amount of $25K and there is no mention of the lien.” *Id.*

There is no entry in the Claim Activity Report preceding September 2008 of defendants telling either plaintiff or Mr. Wiechman that CPI intended to pay or had paid the subrogation demand. *Response Exh*. L. There is no letter preceding September 2008 of defendants telling either plaintiff or Mr. Wiechman that CPI intended to pay or had paid the subrogation demand. *Defendant's Exhs*. H, I, J, K, L, M, N, P. There is no letter at all inquiring as to whether Mr. Wiechman or plaintiff objects to CPI paying the subrogation demand. *Defendant's Exhs*. H, I, J, K, L, M, N, P.

70. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention. The letter does not “acknowledge” the conversation. *Defendant's Exh*. L, p. 44; *Resp. Exh*. K, p. 59/15-19; p. 60/2-5. Rather, the letter purports to be “a follow-up to our conversationy(3)27.” *Response Exh*. Z.

71. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention. On or about February 1, 2008, plaintiff's “Confidential Settlement Brochure” made a demand to settle for $85,263.88. *Plaintiffs Exhibit* 6, ¶10; *Exhibit* 11, p. § V1; *Exhibits* 1-3, ¶8; *Exhibit* 4, ¶8. CPI received the settlement demand. *Plaintiff's Exhibits* 1-3, ¶¶9-10; *Exhibit* 4, ¶¶9-10; *Exhibit* 8, p. 37; *Exhibit* 12.

Avery's letter of March 12, 2008, says CPI would "issue payment in the amount of S25,000" and consider the matter closed upon receipt of the enclosed Release of All Claims. *Plaintiff's Exhibit* 14. The Release of All Claims promised that payment of $25,000 "will be forthcoming." *Plaintiffs Exhibit* 14.

73. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention. The evidence of record shows an entry in the Claims Activity Record for October 16, 2008, of a telephone call from Mr. Wiechman to Avery during which Avery conceded State Farm possessed no PIP lien because its payments were not duplicative of the settlement amount: "there was no lien when there were duplicative pymts. Explained we are aware of thisy(3)27." *Response Exh*. L, p. 45.

75. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention. On February 25, 2009, Avery called for Mr. Wiechman's federal tax identification number, and Mr. Wiechman informed her that he was filing suit against the insurance company for failing to honor the agreement. *Response Exh*. L, p. 46.

76. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention. The referenced evidence shows that, when asked if Gragson saw in the file any explanation for the delay between October 16, 2008, and March 2013, for the lawsuit Mr. Wiechman said he would file against Benchmark, Gragson pointed to the promise to pay $25,000, "and he was going to sue us if we didn't pay it." *Response Exh*. 1, p. 193/13-22. The examination then transitioned to communications occurring "thereafter" without specifying what he was talking about. *Id.* at 193/24-25. Rather than ask a question, defendants' attorney claimed there was "no explanation of why he waited ... four and a half years," to which Gragson disagreed saying "[n]o, no. No sir." *Id.* at 194/5-8.

88. The referenced evidence does not support the contention. Nowhere in the referenced evidence is plaintiff asked about a "lien" of State Farm.

90. The referenced evidence does not support the contention. The referenced evidence shows that, after August 26, 2008, "[a]fter they agreed for the 25,000, and then they had said that they were only going to pay us 17," plaintiff and his attorney "spoke about that." *Response Exh*. J p. 52/1-15. Plaintiff learned the insurance company paid $7,153 several months earlier to State Farm. *Id.* at 52/22-25.

94. The referenced evidence does not support the contention. The referenced evidence is that, between September 16, 2008, and March 8, 2013, plaintiff asked his attorney "what was going on with" plaintiff's lawsuit. *Response Exh*. J, p. 60/20-25. The testimony does not indicate whether the "lawsuit" to which plaintiff referred was the dismissal of plaintiff's personal injury lawsuit or plaintiffs prospective breach of the settlement agreement lawsuit, or if plaintiff thought both claims were in a single lawsuit. *Id.*

The referenced evidence shows that, from December 2008 to March 2013, plaintiff was communicating with his uncle about every three months. *Response Exh*. J, pp. 61/7 — 62/1. The referenced evidence does not show the subject matter of his conversations, and does not show that the subject matter was "about what was happening in the tort case."

98 The referenced evidence does not support the contention. The referenced evidence of Mr. Wiechman's testimony is as follows:

a. it is false and misleading to say that the law required an insured of State Farm to reimburse them the PIP if recovered in a tort case; and,

b. you only have to pay PIP back if what you received in PIP is duplicative of what you received from the defendant; in other words, State Farm may not have any lien whatsoever against plaintiff if what he received is not duplicative.

Response Exh. K (Robert (Rocky) D. Wiechman, Jr. Deposition Transcript), p. 19/8-20.

Also, Exhibit CC of the Insurance Companies accompanying their Second Amended Motion For Summary Judgment is a letter from State Farm to plaintiff, dated July 11, 2006, in which State Farm acknowledges that it is entitled to reimbursement from funds collected from the responsible party "provided they are duplicative of our PIP benefits." *Ins. Cos. Exh*. CC.

103. The referenced evidence does not support the contention. The referenced evidence is that Mr. Wiechman never inquired of defendant CPI as to payments they made to anybody else. *Response Exh*. K, p. 22/20-22.

108. The referenced evidence does not support the contention. The referenced evidence is that Mr. Wiechman would assume the letter of July 20, 2006, indicated to him that State Farm had paid PIP in that amount. *Response Exh*. K, p. 28/11-13.

111. The referenced evidence does not support the contention. The referenced evidence is that Mr. Wiechman and State Farm never talked about any PIP payments, offsets or any other type of payment made by State *Farm. Response Exh*. K. pp. 33/23 — 34/7.

115. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. the letter of March 12, 2008, references a telephone conversation Avery had with Mr. Wiechman occurring either March 11 or 12, 2008;

b. Mr. Wiechman recalls the content of that conversation; and

c. Avery called and "said they were going to offer $25,000 to my client and would send a release which he needed to sign and send back to them, and the case would be over."

Response Exh. K, p. 41/7-24.

In her letter of October 2, 2008, Avery admitted that "[w]e extended an offer to you for your client on March 12, 2008y(3)27." *Response Exh. Z.* That letter mentions nothing about a verbal offer to pay only $7,135.15, or a verbal agreement to pay only $7,135.15.

116. The record shows the contention is not accurate. Defendants' own records prove that, between March 12, 2008, and August 26, 2008, there were communications between Wiechman and Avery. On May 6, 2008, Avery faxed to Mr. Wiechman the identical letter of March 12, 2008, and the identical Release of All Claims. *Plaintiffs Exhibit* 15. It mentioned nothing about a verbal offer to pay only $7,135.15, or a verbal agreement to pay only $7,135.15. *Id.* Again, on June 3, 2008, Avery faxed to Mr. Wiechman the identical letter of March 12, 2008, and the identical Release of All Claims. *Plaintiff's Exhibit* 16. It mentioned nothing about a verbal offer to pay only $7,135.15, or a verbal agreement to pay only $7,135.15. *Id.*

117. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. the telephone conversation of March 11 or 12 was not the first time Mr. Wiechman had spoken to Avery;

b. he spoke with her on February 13, 2008;

c. he thinks there was one other phone conference maybe the end of 2007 after the lawsuit was filed, but he is not real clear on that one; and

d. he tried to call Avery on December 20, 2007, but did not get her on the phone.

Response Exh. K, p. 42/8 — 43/10.

118. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. the conversation on February 13, 2008, was about the settlement demand Avery had received;

b. Avery wanted current photographs of plaintiffs face;

c. Avery wanted to avoid litigation and avoid legal expenses and did not want to hire an attorney to represent Huddleston; and

d. Avery wanted to try to see if the claim could be settled without litigation, legal expenses and hiring any attorney to represent Huddleston.

Response Exh. K, p. 42/8-23.

Also, Mr. Wiechman said he would give her "some time to see if we could get it settled." *Response Exh*. K, pp. 42/24 - 43/1.

119. The record shows Mr. Wiechman told defendant CPI (for the second time) that he represented plaintiff. *Response Exh*. W (second page)("Robert D. Wiechman, Jr. Attorney for Byron T. Wiechman."). Also, in his letter of August 11, 2006, Mr. Wiechman informed CPI that he represented Byron Wiechman. *Response Exh*. R ("My Client Byron Wiechman"). Entries in defendants' Claim Activity Record repeatedly refer to Mr. Wiechman as the claimant's attorney. *See e.g.*, *Response Exh*. L, p. 36 (12/27/07 "Call clmnt's atty"); p. 35 (10/26/07 "clmt has an atty"); p. 34 (10/25/07 "Clmt represented by atty"); p. 33 (10/25/07 "Called clmt's atty 316-264-2155. Mr. Wiechman was no court.").

120. The referenced evidence does not support the contention. The referenced evidence is that, with respect to two letters, Mr. Wiechman testified "I don't think I received them in this form" and "I don't recall receiving them in that form. Doesn't have my address on there and I — I can't testify that I actually received those two letters" and "I don't really recall getting any of those letters." *Response Exh*. K, p. 45/14 - 46/25.

With respect to a third letter, the reference evidence is that Mr. Wiechman does not recall receiving it. *Response Exh*, K, p. 47/1-17.

The referenced evidence does not support the contention of a fourth letter. *Response Exh*. K, pp. 44/17 —47/17.

121. The referenced evidence does not support the contention. The referenced evidence is that, from August through December, other than the August 11 letter, Mr. Wiechman did not have communications with defendant CPI. *Response Exh*. K., p. 48/3-6.

122. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. from August through December, other than the August 11 letter. Mr. Wiechman did not have any communications with defendant CPI, *Response Exh. K*, p. 48/3-6, and

b. some unidentified document reflects a phone call from Avery to his office voicemail on October 25, 2007, and according to the document, the call was not returned, *Id.* at 49/14-20.

124. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. Mr. Wiechman's letter to State Farm of July 21, 2008, made no mention of PIP because it was not relevant, plaintiff had no intention of paying any PIP back, *Response Exh. K.*, p. 52/1-13, and

b. Mr. Wiechman is aware that the settlement brochure included medical bills for plaintiff arising out of the accident indicating payment by State Farm, *Id.* at 52/1449.

125. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. there was never any discussion between Avery and Mr. Wiechman about PIP payments, *Response Exh*. K, p. 52/12-17, and

b. the first time Mr. Wiechman heard from defendants CPI or Benchmark that CPI had reimbursed State Farm was in October 2008, *Id.* at 55/3-10.

128. The referenced evidence does not support the contention. The referenced evidence is that, when he moved his office, Mr. Wiechman could not leave a forwarding address because there were four attorneys in his former building and he couldn't file a change-of-address with the post-office because it would have changed the address for all four attorneys, and they wouldn't let Mr. Wiechman do that. *Response Exh*. K, p. 58/3-9. Mr. Wiechman did not care about receiving anything from CPI because he was going to sue CPI, which he had already told them he was going to do, so there was no reason to talk anymore. *Id.* at 58/10-14.

129. The referenced evidence does not support the contention. See paragraph 128.

131. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. that Mr. Wiechman does not “now” know, where Avery is, *Response Exh*. K, p. 61/17-18. [3]

b. that “we're waiting on you to tell us where she's at or to provide us with documents that haven't been redacted that might help us in locating her” and “I'm sure there's somebody at CPI that knows where she's at,” *Id.* at 61/19-24.

c. that Mr. Wiechman had made effort to locate her by asking Hummer “to provide her address and whereabouts and her information,” and Hummer said he is “working on it,” *Id.* at 61/25 — 62/3, and

d. that, on June 24, 2013, Mr. Wiechman worked on trying to find Avery and has not yet found her, *Id.* at 62/4-11.

132. The referenced evidence does not support the contention. The referenced evidence does not show that Mr. Wiechman “first realized CPI was not going to pay” $25,000 to plaintiff “when he read the transcribed voice mail message. *Response Exh*. K, pp. 64/17 — 65/17. The record evidence shows that Mr. Wiechman learned for the first time that CPI was not going to pay $25,000 after sending the Release to defendant CPI on August 26, 2008. *Id.* at 63/19 — 64/2. He may have learned it in September 2008. *Id.* at 64/3-4. It may have been October 2008. *Id.* at 64/5-14.

133. The referenced evidence does not support the contention. The referenced evidence is that “if there's no date there, then its more likely than not that I did not return that call *on that day*.” *Response Exh*. K, p. 65/8-17 (underlining added)

135. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. Mr. Wiechman thinks defendants' claim activity report contains an entry on October 1, 2008, stating that Avery spoke with Mr. Wiechman on September 26, 2008, and Mr. Wiechman remembers talking to her, *Response Exh*. K, p. 66/18-25;

b. Mr. Wiechman has no notes of that conversation, *Id.* at p. 67/1-2; and

c. the conversation was a disagreement about how much was to be paid and Mr. Wiechman threatened to sue the insurance company, *Id.* at p. 67/3-8.

136. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. that Mr. Wiechman did not have to convey to defendants Benchmark or CPI any objection to them reimbursing Slate Farm's PIP payments, *Response Exh*. K., p. 67/14-18; and

b. that Mr. Wiechman was relying on CPI's letter of July 20, 2006, "where they said they couldn't pay it until they received stuff from me, so I was under the assumption that they weren't going to pay anything until heard from me and got medical bills and records from me," which did not happen until February 2008, *Id.* at 67/18 - 68/1.

Also, the evidence of record shows that, in the letters to plaintiff of June 20, 2006, and July 20, 2006, CPI represented that "[w]e are unable to consider reimbursement [to State Farm] unless we have all of the medical records and bills to support their claim." *Response Exhs*. P and Q; *Plaintiff's Exhibit* 37, ¶4. Defendants never informed Mr. Wiechman of the falsity of their written representation. *Plaintiff's Exhibit* 37, ¶4. Relying on that representation, Mr. Wiechman withheld from CPI the medical records and bills. *Id.* Nevertheless, and contrary to their written representation, on March 14, 2007, less than 18 months after the date of the accident, CPI reimbursed State Farm. *Id.* Prior to September 2008, Mr. Wiechman did not know that CPI intended to pay or had paid the subrogation demand of State Farm *Id.*

The letters from CPI to Mr. Wiechman, sent after CPI paid State Farm's subrogation demand, and prior to August 26, 2008, conceal the fact that CPI had paid the subrogation demand. *Plaintiff's Exhibits* 12, 14, 15, 16.

There is no entry in the Claim Activity Report preceding September 2008 of defendants telling plaintiff or Mr. Wiechman that CPI intended to pay or had paid the subrogation demand. *Response Exh*. L. There is no letter preceding September 2008 of defendants telling plaintiff or Mr. Wiechman that CPI intended to pay or had paid the subrogation demand. *Defendant's Exhs*. H, I, J, K, L, M, N, P. There is no letter at all inquiring as to whether Mr. Wiechman or plaintiff objects to CPI paying the subrogation demand. *Defendant's Exhs*. H, I, J, K, L, M, N, P.

144. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. after the August 15, 2008, letter from Judge Fleetwood. Mr. Wiechman did not do anything to follow up to see that the personal injury lawsuit was not dismissed "because we settled the case on August 26th of #08," *Response Exh*. K, p. 71/3-7;

b. Mr. Wiechman did not believe the case was not settled, *Id.* at 71/8-12;

c. Mr. Wiechman knew the case was settled for $25,000, *Id.* at 71/12-16;

d. in October 2008, Mr. Wiechman knew defendant CPI was saying they were not paying $25,000 because of the prior PIP reimbursement to State Farm, and he understood CPI was not willing to pay $25,000, and "I thought we had a difference of opinion as to the interpretation of the release," *Id.* at 71/17 — 72/6; and

e. Mr. Wiechman did not do anything to prevent dismissal of the Personal Injury Lawsuit because he did not have to because there was a settlement with defendants, *Id.* at 72/7-17.

145. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. on September 26, 2008, and again in October 2008, Mr. Wiechman told Avery he was going to sue the insurance company, *Response Exh*. K, p. 73/12-17;

b. there was a possibility that Mr. Wiechman may be a witness in the case and his attorney of choice and plaintiff's attorney of choice was Ron Beal, who was involved in a major malpractice lawsuit against a Kansas City law firm in Butler County, *Id.* at 73/18-74/6, 74/10-11;

c. Mr. Beal informed Mr. Wiechman that he was unable to take this case, and it was not until March 2013 that he was free to take this case, *Id.* at 74/6-9.

146. The evidence of record shows that, from September 26, 2008, over the next couple of years, Mr. Wiechman was not familiar with any Wichita lawyers he believed were capable of filing suit against CPI and Benchmark to the extent that Mr. Beal would be in representing plaintiff. *Response Exh*. K, p. 74/12-18.

Also, the referenced evidence does not support the contention. The referenced evidence is as follows:

a. there were no lawyers in Wichita during the two years after September '>08 that Mr. Wiechman felt were capable of filing and pursuing competently a contract action against the defendants to the extent that Mr. Beal is capable and competent, *Response Exh*. K, p. 75/17-23.

b. the preference of Mr. Wiechman "was to have Mr. Beal and Mr. Beal alone do this, absolutely." *Id.* at 75/24 — 76/3.

147. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. Mr. Wiechman did not file this action prior to March 2013 because Mr. Beal was not available, *Response Exh*. K, p. 76/4-9;

b. Mr. Wiechman did not file this action within a couple of years post-September 2008 because he knew he had to get Mr. Beal involved shortly after filing, and Mr. Beal was not available, *Id.* at 76/10-21.

152. The referenced evidence does not support the contention that there was a PIP "lien," and does not support the contention that Mr. Wiechman "acknowledged knowing of the PIP lien." The referenced evidence is that Mr. Wiechman acknowledged "the PIP *payments* made in this case" by State Farm. *Defendant's Exh*. R (underlining added).

The record evidence shows State Farm possessed no PIP lien; that plaintiff's damages ($85,000+) equals or exceeds the liability coverage ($25,000) plus the amount of PIP benefits paid by State Farm ($7,135.15), meaning there was no double recovery. *Ins. Cos. Exh*. Y, p. 19/8-20; *Plaintiff's Exhibit* 11.

Also, Exhibit CC of the Insurance Companies in their Second Motion For Summary Judgment is a letter from State Farm to plaintiff, dated July 11, 2006, in which State Farm acknowledges that it is entitled to reimbursement from funds collected from the responsible party "provided they are duplicative of our PIP benefits." *Ins. Cos. Exh*. CC.

156. Defendants' own records show that Gragson's restatement of the evidence at his deposition is not accurate and the referenced evidence does not support the contention. By August 11, 2006, defendants knew Mr. Wiechman represented plaintiff. *Response Exh*. R. Also, the referenced evidence does not support the implication of a connection between the alleged non-responsiveness of Mr. Wiechman and defendant CPI's payment of the subrogation demand. *See also supra*, p. 26, ¶136.

ARGUMENTS AND AUTHORITIES

I. BASED ON THE LEGALLY RELEVANT UNCONTROVERTED FACTS AND APPLICABLE LAW, THE PAYMENT TERM OF THE SETTLEMENT AGREEMENT WAS TO PAY $25,000 TO PLAINTIFF.

Plaintiff showed that, under well-established Kansas law, when the *legally relevant* facts are undisputed, the existence and terms of a contract raise questions of law for the court's determination, and whether a contract has been formed by an exchange of writings is a question of law. *Plaintiff's Motion*, pp. 13-19. The Insurance Companies do not challenge either plaintiff's recitation of these principles or their application to the (incontroverted facts. *Response*, pp. 25-31.

A. The Parties' Outward Manifestations and Expressions of Assent Prove the Existence Of A Settlement Agreement.

1. What Is A "Meeting of the Minds."

Plaintiff previously detailed Kansas law on the "meeting of the minds" principle of contract formation. *Plaintiff's Motion*, pp. 13-15. The Insurance Companies do not challenge either plaintiffs recitation of these principles or their application to the uncontroverted facts, *Response*, pp. 25-31.

2. There Was A "Meeting of the Minds" As To the Existence Of A Settlement Agreement

Plaintiffs previously showed a "meeting of the minds" as to the existence of a settlement agreement; that on August 26, 2008, defendants' standard form Release of all Claims, which defendants provided for plaintiff's signature, was returned to defendants properly signed and notarized, thereby constituting an acceptance of defendants' settlement offer to pay $25,000 to plaintiff and forming a binding settlement agreement *Plaintiff's Motion*, pp. 15-19. [4]

The Insurance Companies no longer contest the existence of a settlement agreement. *Response*, pp. 25-31. Rather, they argue there exists a genuine issue of material fact as to whether the payment term to which the parties agreed was $25,000 or $17,864.85. *Id.*

B. The Payment Term Was $25,000, not $17,864.85.

1. The Release Unambiguously Requires Payment of $25,000 To Plaintiff.

Plaintiff previously detailed Kansas law applicable to determining whether a written agreement is or is not ambiguous, and showed that the Release unambiguously required payment of $25,000 to plaintiff. Defendants' letter of March 12, 2008, accompanying the Release expressly states that defendants *will issue payment in the amount of $25.000* upon receipt of the Release: "Upon receipt of the properly executed release, we will issue payment in the amount of $25,000.00 and consider the matter resolved." *Facts* ¶14. The letter specifies the "amount" of the "payment" to be "issued" is $25,000, not $17,864,85. The Release accompanying defendants' letter expressly states that a payment of $25,000 will be forthcoming: "the Undersigned, being of lawful age, for the sole consideration Twenty Five Thousand - 00/-100 ($25,000.00) to the undersigned (payment will be forthcoming)y(3)27." *Facts* ¶16. The Release specifies the dollar amount of the payment to be forthcoming — $25,000, not $17,864.85.The settlement clearly and unambiguously specifies the amount of the payment plaintiff was to receive — $25,000. *Plaintiff's Motion*, pp. 19-21.

The Insurance Companies do not challenge either plaintiff's recitation of the law or plaintiff's showing that the settlement unambiguously requires a payment in the amount of $25,000 to plaintiff. *Response*, pp. 25-31. They do not argue that, after applying pertinent Kansas law of contract interpretation, the payment term is somehow ambiguous. *Id.*

2. If the Payment Term Is Somehow Ambiguous, It Must Be Construed In Favor of Plaintiff and Against Defendants.

Plaintiff previously detailed Kansas law applicable to construing a written agreement prepared by an insurance company, and showed that, even if there is an ambiguity in the language of the Release (which there is not) as to whether the amount to be paid to plaintiff was $25,000 or $17,864.85, because the Insurance Companies prepared the Release and because an ambiguity in a

written agreement prepared by an insurance company must be construed against the insurance company, the agreed amount to be paid to plaintiff was $25,000, not $17,864.85. *Plaintiffs Motion*, pp. 21-23. The Insurance Companies do not challenge either plaintiffs recitation of the law or plaintiff's showing that any ambiguity must be construed as meaning a payment to plaintiff of $25,000, not $17,135.15. *Response*, pp. 25-31.

C. The Argument of the Insurance Companies — That There Was An Enforceable Verbal Agreement For $17,864,185 Which Preceded the Written Settlement Agreement— Fails For Several Reasons.

The Insurance Companies argue that, notwithstanding their promise to "issue payment in the amount of $25,000.00 and consider the matter resolved," and their promise that payment of $25,000 "will be forthcoming," and notwithstanding plaintiffs acceptance of those promises by signing and delivering defendants' standard form Release, a genuine issue of material fact exists as to whether the parties agreed that defendants would pay $25,000 to plaintiff:

"As it now stands, there is still a clear question of fact regarding whether the '$25,000' stated in the release included the PIP payment or not, A jury will have to decide that issue as the facts are controverted ...."

Response, p. 26. The Insurance Companies say that a "telephone conversation between Avery and Attorney Wiechmany(3)27 resulted in the settlement." *Id.* at 25-26. They do not disclose the date of that telephone conversation, *Id.* at 25-31, and their contentions of fact do not mention a telephone conversation between Avery and Attorney Wiechman which resulted in a settlement, *Id.* at 11-25. However, on page 19 of their Second Motion For Summary Judgment, the Insurance Companies say the letter of March 12, 2008, accompanied by the Release of All Claims followed the alleged oral agreement: "The oral agreement was made and Avery followed with a letter and a release." *Second Amended Motion For Summary Judgment*, p. 19.

For several reasons, the alleged verbal agreement does not preclude the entry of summary judgment for plaintiff. First, under Kansas law, a subsequent written agreement embodies all prior understandings and agreements. Here, the written settlement agreement was entered on August 26, 2008, when plaintiff faxed the properly signed Release of Ail Claims to defendant CPI. That agreement embodied all prior understandings and agreements, including the alleged verbal agreement to pay only $ 17,864.85. *See infra*, p. 33.

Second, under the parol evidence rule, evidence of an alleged verbal agreement preceding the written agreement is not admissible if it conflicts with or is inconsistent with the written agreement. Here, evidence of an alleged verbal agreement entered on March 11, 2008 (or at any time preceding August 26, 2008), to pay plaintiff only $17,864.85 is not admissible because it conflicts with and is inconsistent with the subsequent written settlement agreement to pay $25,000 to plaintiff. *See infra*, pp. 33-36.

Third, the Insurance Companies have come forward with no evidence of an outward manifestation or expression of assent on the part of the plaintiff to accept payment of $17,864.85 to settle his personal injury claim. To the contrary, the evidence of the Insurance Companies shows that, in the Claim Activity Report, Avery made a record of her telephone conversation with Mr. Wiechman of March 11, 2008, and that record shows there was no offer to pay $17,864.85 and no acceptance of any supposed offer to pay only $17,864,85. *Infra*, pp. 36-42.

1. Under Kansas law, a subsequent written agreement embodies all prior oral understandings and agreements.

Under Kansas law, "it is elementary that an oral agreement entered into prior to or contemporaneously with a written agreement is merged into the latter." *Oaks v. Hill*, 182 Kan. 501, 503, 322 P.2d 814 (1958). *See also Brown v. Beckerdite*, 174 Kan. 153, Syl ¶1, 254 P.2d 308 ("When oral conversations or negotiations lead to the execution of a written contract, they are thereby merged into the written instrument, from which the terms of the contract are to be determined."); *Frogge v. Belford*, 168 Kan. 74, 78, 211 P.2d 49 (1949)(same). This point of law, in and of itself, rules out the alleged prior verbal agreement to pay only $17,864.85. The written. settlement agreement was entered on August 26, 2008, when plaintiff faxed the properly signed Release of All Claims

to defendant CPI. That agreement embodied all prior understandings and agreements, including the alleged verbal agreement to pay only $17,864.85.

2. Under the parol evidence rule, evidence of an alleged verbal agreement preceding August 26, 2008, to pay plaintiff only $17,864.85 is not admissible because it conflicts with and is inconsistent with the written settlement agreement to pay $25,000 to plaintiff.

The "[p]arol evidence rule is [a] rule of substantive contract law, not a rule of evidence." *Prophet v. Builders, Inc.*, 204 Kan. 268, 272, 462 P.2d 122 (1969). Under the parol evidence rule, [5] "[w]hen a contract is complete, unambiguous, and free from uncertainty, parole evidence of prior or contemporaneous agreements or understandings tending to *vary the terms of the contract evidenced by the writing* is inadmissible." *In re Estate of McLeish*, 49 Kan.App.2d 246, 256, 307 P.3d 221 (2013), quoting *Simon v. National Farmers Organization, Inc.*, 250 Kan. 676, 679-80, 829 P.2d 884 (1992).

"The practical justification for the rule lies in the stability that it gives to written contracts; for otherwise either party might avoid his obligation by testifying that a contemporaneous oral agreement released him from the duties that he had simultaneously assumed in writing.' 4 Williston, Contracts, § 631. In other words, the parol evidence rule addresses the fact that 'disappointed parties will have a great incentive to describe circumstances in ways that escape the explicit terms of their contracts.' Fried, Contract as Promise (Cambridge: Harvard University Press, 1981) at 60."

VAW-GU Human Resource Ctr. V. KSL Recreation Corp., 579 N.W.2d 411, 414 (MichApp. 1998).

The Release includes an integration clause stating it "contains the entire agreement.y(3)27" *Facts* ¶14. *See ARY Jewelers, LLC. v. Krigel*, 277 Kan, 464, 476-77, 85 P.3d 1151 (2004)("Both the SPA and the consulting agreement contain integration clauses that provide they constitute the "entire agreement."). [6]

The payment provision clearly and unambiguously promises "Twenty Five Thousand — 00-100 ($25,000.00) to the undersigned (payment will be forthcoming)." *Facts* Kil. A natural and reasonable interpretation of the payment term is that $25,000 would be paid to plaintiff, not $17,864.85.

The alleged prior verbal agreement to pay only $17,864,85 to plaintiff "tends to vary the terms of the contract evidenced by" the Release which promises that a payment of $25,000 "will be forthcoming." A "forthcoming" payment of $25,000 excludes a forthcoming payment of only $17,864.85.

The Insurance Companies emphasize passages from Kansas cases stating that the parol evidence rule does not apply to a contract that is incomplete or silent as to a particular term. *Response*, pp. 27-28. That principle does not apply. The settlement agreement is not incomplete or silent as to the payment term — $25,000.

The conditions for applying the parol evidence rule are met; testimony of an alleged verbal agreement to pay only $17,864.85 to plaintiff is not admissible. A party opposing summary judgment must produce "something of evidentiary value." *Kastner v. Blue Cross & Blue Shield of Kansas, Inc.*, 21 Kan.App.2d 16, Syl. ¶ 6, 894 P.2d 909, *rev. denied* 257 Kan. 1092 (1995); *see also* K.S.A. 60-256(e) (requiring affidavits supporting or opposing summary judgment to "be made on personal knowledge," to "set forth such facts as would be admissible in evidence," and to "show affirmatively that the affiant is competent to testify to the matters stated therein."). Inadmissible evidence is not considered on a summary judgment motion because it would not establish a genuine issue of material fact if offered at trial, and continuing the action would be useless. 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2727, pp. 495-98 (1998). The Insurance Companies have produced nothing of evidentiary value to support their allegation of a verbal agreement preceding the settlement. This, in and of itself, rules out the alleged prior verbal agreement to pay only $17,864.85.

It is ironic that a release which the Insurance Companies themselves designed and used as their standard form foils their verbal agreement allegation. Their standard form Release expressly states that "this release contains the entire agreement between the parties hereto, and that the terms of this Release are contractual and not a mere recital." *Plaintiff's Exhibit* 21. This provision forecloses the allegation of a prior verbal agreement. The parties themselves expressly agreed that alleged verbal agreement was never made and was never part of the agreement of the parties. Insurance companies which use standard forms to settle claims do not make enforceable verbal settlement agreements. Their standard forms include provisions to foreclose the type of verbal agreement now being alleged by the Insurance Companies.

3. The evidence proffered by the Insurance Companies shows there was no outward manifestation or expression of assent by plaintiff to accept a payment of only $17,864.85 to settle his personal injury claims.

Even if parol evidence is considered, the evidence proffered by the Insurance Companies shows there was no outward manifestation or expression of assent by plaintiff to accept a payment of only $17,864.85 to settle instead of the $25,000 amount offered. Under Kansas law, mutual assent or the "meeting of the minds" consists of *mutual* expressions, not harmonious intentions or states of mind, and depends on the outward manifestations or expressions of assent of the parties. Whether the parties agreed to pay plaintiff $17,864.85 depends on the outward manifestations or expressions of assent of the parties, not on their states of minds:

In determining intent to form a contract, the test is objective rather than subjective, meaning that the relevant inquiry is the manifestation of the parties' intentions, rather than their actual but unstated and unwritten intentions. The inquiry will focus not on the question of whether the subjective minds of the parties have met, but on whether their outward expression of assent is sufficient to form a contract.

Southwest and Associates, Inc. v. Steven Enterprises, LLC, 32 K.A.2d 778, Syl. ¶2, 88 P.2d 1246 (2004). Highly respected treatises make the same point. For example, Professor Arthur L. Corbin explained it this way:

"Agreement consists of mutual expressions; it does not consist of harmonious intentions or states of mind. It may well be that intentions and states of mind are themselves nothing but chemical reactions or electrical discharges in some part of the nervous systems. It may be that some day we may be able to observe chemical processes and electrical discharges. At present, however, what we observe for judicial purposes is the conduct of the parties. We observe this conduct and we describe it as the expression of a state of mind. It is by the conduct of two parties, by their bodily manifestations, that we must determine the existence of what is called agreement."

1 Corbin, *Corbin on Contracts* § 1.9 (1993). *See also* P.I.K.-Civil 3d § 124.04, *quoting* 1 *Corbin on Contracts* § 9 (1952)("It is by the conduct of two parties, by their bodily manifestations, that we must determine the existence of what is called an agreement. This is what is meant by the anciently-honored term "meeting of the minds. This is what is meant by mutual assent.").

Put another way, "the inquiry will focus not on the question of whether the subjective minds of the parties have met, but on whether their outward expression of assent is sufficient to form a contract." 1 *Wllliston on Contracts* § 4.1, p. 336 (4th ed. 2007). *See* 17A Am.Jur.2d, Contracts § 31 (The test is objective, rather than subjective, meaning that the relevant inquiry is the manifestation of a party's intention, rather than the actual or real intention.). "One method by which the intention to contract may be demonstrated is by the process of offer and acceptance. An offer has been described as a manifestation of willingness to enter into a bargain." *Prince Enterprises, Inc. v. Griffith Oil Co.,* 8 K.A.2d 644, 649, 664 P.2d 877, *rev. denied* 133 Kan. 1092 (1983).

The evidence proffered by the Insurance Companies shows there was no outward manifestation or expression of assent by the plaintiff to accept a payment of only $17,864.85. In the Claim Activity Report, Avery made a record of her telephone conversation with Mr. Wiechman held on March 11, 2008. *Response Exh.* L, p. 39. The report shows Avery did not offer $17,864.85, and shows Mr. Wiechman did not accept $17,864.85. *Id,* The report contains no entry whatsoever of an offer of $17,864.85, and contains no entry whatsoever of plaintiff accepting an offer of $17,864.85. *Id.* The Insurance Companies admit

the report "contains anything that transpired in the course of the claim, a running time line of everything done in the claims system includingy(3)27 conversations the adjuster conducts with anyone related to the claim handling." *Response*, p. 12, ¶45.

Moreover, the Claim Activity Report shows it was not until the following day - March 12, 2008 — that Avery spoke with and received from Gragson approval to settle. *Response Exh*. L, p. 39. That same day, Avery sent her letter promising to "issue payment in the amount of $25,000" upon receipt of the signed release. *Facts* ¶14. Having promised a payment of $25,000 on March 12, 2008, it is not reasonable to believe that, the previous day, plaintiff agreed to accept a payment of only $17,864.85 to settle his personal injury claim. Having promised a payment of $25,000 on March 12, 2008, it is not reasonable to believe Avery would honestly testify that, the previous day, plaintiff agreed to accept a payment of only $17,864.85 to settle his personal injury claim. This is true particularly because the Claim Activity Report reflects that no such agreement was made, and because Avery did not receive settlement approval from Gragson until March 12. Avery would not have offered to pay $25,000 to plaintiff on the 12th if, the day before, Mr. Wiechmanhad verbally accepted a verbal offer to pay only $17,864.85 to plaintiff.

Accompanying Avery's letter of March 12, 2008, was the proposed Release. It promised payment of $25,000 "will be forthcoming." *Facts* ¶16. The Release does not say $17,864.85 "will be forthcoming." *Id.* Also, the Release states that it is contractual, and not a mere recital *Facts* ¶16. Having sent a Release promising that a payment of $25,000 would be forthcoming, it is not reasonable to believe that, the previous day, plaintiff agreed to accept a payment of only $17,864.85 to settle his personal injury claim, or that Avery would honestly testify that, the previous day, plaintiff agreed to accept a payment of only $17,864.85 to settle his personal injury claim, particularly because the Claim Activity Report reflects that no such agreement was made, and because Avery did not receive settlement approval from Gragson until the 12th. The Release would not have included a payment term of $25,000 if, the previous day, Mr. Wiechman had verbally accepted a verbal offer to pay only $17,864.85 to plaintiff.

In a fax on May 6, 2008, defendants repeated their offer to pay $25,000 to plaintiff, faxing the identical March 12 letter and Release to plaintiffs attorney. *Exhibit* 15. The fax says nothing about a verbal agreement. *Id.* Moreover, if Avery and Mr. Wiechman had previously made a verbal agreement for $17,864.85, Avery would not have sent a letter in May 2008 promising to "issue payment in the amount of $25,000" upon receipt of the properly executed release, and she would not have been sending a proposed release in May 2008 promising that payment of $25,000 "will be forthcoming."

In a fax on June 3, 2008, defendants re-repeated their offer to pay $25,000 to plaintiff, faxing the identical March 12 letter and Release to plaintiff's attorney. *Exhibit* 16. The fax says nothing about a verbal agreement. *Id.* Moreover, if Avery and Mr. Wiechman had previously made a verbal agreement for $17,864.85, Avery would not have sent a letter in June 2008 promising to "issue payment in the amount of $25,000" upon receipt of the properly executed release, and she would not have been sending a proposed release in June 2008 promising that payment of $25,000 "will be forthcoming."

Having received from defendants multiple offers to pay $25,000 to plaintiff, it is not reasonable to believe, and there is no evidence from which to argue, that Mr. Wiechman made a counter-offer of $17,864.85 or accepted a verbal offer of $17,864.85.

The settlement agreement was formed on August 26, 2008, the day the properly signed Release was faxed to defendants. Avery made an entry in the Claim Activity Report which says "Rec'd Properly signed Release of All Claims from clmt's atty" and "Will issue pymt" and "This matter has settled." *Response Exh*. L, p. 42.

To support their allegation that plaintiff agreed to accept payment of only $17,864.85 instead of $25,000, the Insurance Companies also rely on a message Avery left 10 *days after* the signed Release was delivered to defendants. On September 5, 2008, Avery left a message saying "she needs a copy of the dismissal & your firms federal I.D.# so she can issue the check ...." *Response Exh*. C. The message also says that Avery "wants to remind you that they reimbursed the PIP carrier of $7,153.15 so the balance is $17,846.85." *Response Exh*. C. Just like the telephone conversation on March 11, 2008, the message of September 5, 2008, is not evidence of a "meeting of the minds" that plaintiff would accept payment of only $17,864.85 instead of a $25,000 payment; it is not evidence of an outward manifestation or expression of assent by plaintiff to accept a payment of only $17,864.85 instead of the $25,000. Indeed, it further confirms the absence of a verbal agreement. If there had been a verbal

agreement, Avery would have left a message reminding Mr. Wiechman of the verbal agreement to pay only $17,864,85 to plaintiff. That was ***not*** the message.

Neither of the two letters authored by defendants' attorney claims there was a verbal agreement to pay $17,864.85 to plaintiff to settle. *Exhibits* 26-27. On February 26, 2009, Hummer admitted that defendant CPI "made a settlement offer to you for its policy limit of $25,000 *without mention of the deduction for PIP paid.*" *Exhibits* 26. He made no mention of, and did not claim there was, a verbal agreement preceding August 26, 2008. *Id.* On March 17, 2009, Hummer admitted plaintiff had accepted defendants' offer: "about five months later (August 26) you accept that offer." *Exhibit* 27. He made no mention of, and did not claim there was, a verbal agreement preceding August 26, 2008. *Id*, Stating that the offer was accepted on "August 26" completely and totally belies the contention of the Insurance Companies that Mr. Wiechman accepted a verbal offer in March 2008 for only $17,864.85.

The Insurance Companies also rely on a letter from Avery written *five months after* the Release was delivered to defendants thereby forming the settlement agreement. On January 22, 2009, Avery wrote that "[t]his letter is a follow-up to our offer and your acceptance of our offer." *Response Exh*. D. Avery does not say there was verbal agreement to pay only $17,864.85. *Id.* In fact, none of Avery's letters say there was a verbal agreement to pay $17,864.85 to plaintiff to settle. *Response Exhs*. D, X, Z. For example, in her letter of October 2, 2008, Avery stated "[w]e extended an offer to you for your client on March 12, 2008 ..." *Response Exh*. Z. She mentions nothing about a verbal agreement. *Id.* Like the telephone conversation on March 11, 2008, Avery's letters are not evidence of a "meeting of the minds" that plaintiff would accept payment of only $17,864,85 instead of a $25,000 payment; they are not evidence of an outward manifestation or expression of assent by plaintiff to accept a payment of only $17,864.85 instead of the $25,000.

The Insurance Companies assert that "Avery's file notes reflect her *belief* that the release properly included both the PIP reimbursement and payment of the remaining balance," and that her letters "are consistent with her *belief*," and that payment of only $17,864.85 was consistent with this and with that. *Response*, p. 26 (underlining added). Avery's subjective belief, and whether that belief is consistent with other extraneous facts, are not material:

In determining intent to form a contract, the test is objective rather than subjective, meaning that the relevant inquiry is the manifestation of the parties' intentions, rather than their actual but unstated and unwritten intentions. The inquiry will focus not on the question of whether the subjective minds of the parties have met, but on whether their outward expression of assent is sufficient to form a contract.

Southwest and Associates, Inc. v, Steven Enterprises, LLC, 32 K.A.2d 778, Syl. ¶2, 88 P.2d 1246 (2004).

The evidence shows no outward manifestations or expressions of assent on the part of plaintiff to accept $7,135.15 less than the amount offered on March 12, 2008, and on May 6, 2008, and on June 3, 2008. The only evidence of mutual outward manifestations or expressions of assent of the parties is the offer memorialized by Avery's letter of March 12, 2008, accompanied by defendants' standard form Release of All Claims, and plaintiff's acceptance of the offer by delivering the signed Release to defendants on August 26, 2008. The letter and the Release make clear that the parties outwardly manifested or expressed mutual assent to a payment to plaintiff of $25,000, not $17,864.85. The $25,000 settlement attained the expressed goals which Insurance Companies told Mr. Wiechman they sought to achieve: a settlement of plaintiff's personal injury claim and to avoid involving an attorney. The Insurance Companies did not express to Mr. Wiechman a goal to settle plaintiffs personal injury claim for $17,864.85.

II. THE PAYMENT TERM IS IN WRITING, NOT VERBAL, SO THE THREE YEAR STATUE OF LIMITATIONS DOES NOT APPLY.

Plaintiff previously showed that the material terms of the settlement agreement are in writing so the five-year statute of limitations applies and the three year statute of limitations does not apply, and that this action was commenced prior to the

expiration of the five year statute of limitations. *Plaintiff's Motion*, pp. 25-27. The insurance Companies admit that "Plaintiff filed this case within the 5-year statute of limitations." *Response*, p. 43.

The Insurance Companies say the three year statute of limitations applies because of the alleged verbal agreement to pay only $17,864.85 instead of the $25,000 amount specified in the written settlement agreement. *Response*, pp. 33. They mention "an oral conversation immediately prior to the issuance of the 'standard form' release" and Avery's letter of March 12, 2008. *Id.*

For several reasons, the alleged verbal agreement does not preclude the entry of summary judgment for plaintiff First, under Kansas law, a subsequent written agreement embodies all prior understandings and agreements. Here, the written settlement agreement was entered on August 26, 2008, when plaintiff faxed the properly signed Release of All Claims to defendant CPI. That agreement embodied all prior understandings and agreements, including the alleged verbal agreement to pay only $17,864.85. This point was previously *made. See supra*, p. 33.

Second, under the parol evidence rule, evidence of an alleged verbal agreement preceding the written agreement is not admissible if it conflicts with or is inconsistent with the written agreement. Here, evidence of an alleged verbal agreement entered on March 11, 2008 (or at any time preceding August 26, 2008), to pay plaintiff only $17,864.85 is not admissible because it conflicts with and is inconsistent with the subsequent written settlement agreement to pay $25,000 to plaintiff. This point was previously made. *See supra*, pp. 33-36.

Third, the Insurance Companies have come forward with no evidence of an outward manifestation or expression of assent on the part of the plaintiff to accept payment of $17,864.85 to settle his personal injury claim. To the contrary, the evidence of the Insurance Companies shows that, in the Claim Activity Report, Avery made a record of her telephone conversation with Mr. Wiechman of March 11, 2008, and that record shows there was no offer to pay $17,864.85 and no acceptance of any supposed offer to pay only $17,864.85. This point was previously made. *See supra*, pp. 36-42.

Fourth, the "verbal agreement" allegation should be rejected because it was not disclosed by defendants in response to plaintiffs interrogatories. In interrogatories, defendants were asked to "[f]ully disclose all information on which you rely or which you consider significant for contending that the applicable statute of limitations is three years." *Facts* ¶29. Defendants asserted the settlement agreement "did not contain all the material terms," but they did not disclose a single term not in writing, and they did not disclose their contention of a verbal agreement to pay $17,864.85 to plaintiff *Id.*

The Court has discretion to exclude testimony from a witness who is not properly identified during discovery or in pretrial order. *West v. Martin*, 11 Kan.App.2d 55, Syl. ¶1, 713 P.2d 957 (1986). It follows, then, that the Court has discretion to disregard a defense that was not properly disclosed in discovery. Otherwise, litigants would have every incentive to conceal their defenses and perpetuate discovery **abuse**. Accordingly, the Court should exercise its discretion and reject this defense for failure to comply with the discovery obligations.

III. THE AFFIRMATIVE DEFENSE OF LACHES DOES NOT PRECLUDE THE ENTRY OF SUMMARY JUDGMENT FOR PLAINTIFF.

Plaintiff previously showed that plaintiffs claim is not barred by the doctrine of laches because laches has *no* application when a claim is brought within an applicable statue of limitations period, and because there is no evidence to support the defense. *Plaintiff's Motion*, pp. 35-37.

In response, the Insurance Companies fail to cite a single case where a Kansas appellate court, faced with the issue of whether laches applied notwithstanding that a statute of limitations applied, ruled that laches applied and barred the claim. The cases on which they rely neither raise nor answer the issue of whether laches applies notwithstanding the existence of a statutory limitations period governing the claim. In each and every case cited by the Insurance Companies, the parties never raised the issue of whether laches applies notwithstanding the existence of a statutory limitations period governing the claim, so those

decisions are of no import. Indeed, those decisions do not neither even mention *Yeager, Jennings, Boucek* or *Chavez-Aguilar*. Consequently, the cases on which the Insurance Companies rely are of no value whatsoever. Laches does not preclude the entry of summary judgment for plaintiff. *Infra*, pp. 44-51.

Additionally, the Insurance Companies have failed to come forward with evidence of the essential elements of laches. Therefore, laches does not preclude the entry of summary judgment for plaintiff. *Infra*, pp. 51-59.

A. The Doctrine of Laches Has No Application To An Action For Which There Exists An Applicable Statute Of Limitations.

Plaintiff previously showed that, under *Yeager v. National Cooperative Refinery Ass'n*, 205 Kan. 504, 509, 470 P.2d 797 (1970), and its progeny, laches does not apply to a cause of action brought within an applicable statute of limitations, and this principle includes equitable causes of action where there is a corresponding legal right or remedy and a statute of limitations applicable to that corresponding legal right or remedy (hereinafter "the *Yeager* rule"). *Plaintiff's Motion*, pp. 35-37.

In response, the Insurance Companies raise a red-herring. They argue that laches applies to actions at law, and they cite several Kansas cases for support, *Response*, pp. 38-40, but plaintiff has not argued that laches does not apply to actions at law. Plaintiff's argument is that, under *Yeager, Jennings, Boucek* and *Chavez-Aguilar*, laches does not apply to an action brought within an applicable statute of limitations, and this rule includes equitable actions where there is a corresponding legal right or remedy and a statute of limitations applicable to that corresponding legal right or remedy. *See Plaintiff's Motion*, pp. 35-37, discussing *Yeager v. National Cooperative Refinery Ass'n*, 205 Kan. 504, 509, 470 P.2d 797 (1970); *Jennings v. Jennings*, 211 Kan. 515, 527, 507 P.2d 241 (1973); *Boucek v. Boucek*, 297 Kan. 865, 871, 305 P.3d 597 (2013). *See also State v. Chavez-Aguilar*, 2011 WL 6382742, *11 (Kan.App., December 16, 2011)(unpublished opinion)("Because the statute governing motions to withdraw pleas after sentencing now contains an explicit time limitation to file such a motion, any consideration of the equitable doctrine of laches no longer appears to be necessary or appropriate in determining whether a motion to withdraw plea should be granted.").

The *Yeager* rule makes sense. When a statute, adopted by the legislature, specifies a limitations period by which time an action must be commenced, that period must govern. *The statute of limitations itself takes delay into account*. Consequently, Kansas has a three year statute to claims based on verbal agreements, and a five year statute applies to claims based on written agreements. Laches does not over-ride a statutory limitations period. Rather, laches fills the vacuum for cases where there is no applicable statute of limitations. Laches was developed by courts of equity; its principal application was to claims of an equitable nature for which the Legislature has provided no fixed time limitation, not to claims for which the Legislature has provided a statute of limitations. *See* 1 D. Dobbs, *Law of Remedies* § 2.4(4), p. 104 (2d ed. 1993)("laches should be limited to cases in which no statute of limitations applies"). Applying a specific limitations period adopted by the Kansas Legislature for recovering on written contracts provides uniformity and certainty to the time by which an action must be brought; a contrary rule would unnecessarily increases litigation, as this case proves.

The Insurance Companies pretend otherwise. However, the cases on which they rely neither raise nor answer the issue of whether laches applies notwithstanding the existence of a statutory limitations period governing the claim. In each and every case cited by the Insurance Companies, the parlies never raised the issue of whether laches applies notwithstanding the existence of a statutory limitations period governing the claim, so the opinions neither answer the issue nor apply the *Yeager* rule. The cases on which they rely never even mention *Yeager, Jennings, Boucek* or *Chavez-Aguilar*. Consequently, the cases on which the Insurance Companies rely are of no value whatsoever.

Moreover, in all of the cases on which the Insurance Companies rely the claimant never asserted the *Yeager* rule, and almost all of the cases on which they rely are equitable actions, which may explain why the claimant never asserted the *Yeager* Rule. For example, *Darby v. Keeran*, 211 Kan. 133, 505 P.2d 710 (1973), and *Rex v. Warner*, 183 Kan. 763, 332 P.2d 572 (1958), were equitable actions for specific performance. *Capitol Federal Sav. & Loan Assn. v. Glenwood Manor, Inc.*, 235 Kan. 935, 686 P.2d 853 (1984) was a mortgage foreclosure action.

Additionally, both *Rex v. Warner*, 183 Kan. 763, 332 P.2d 572 (1958), and *McDaniel v. Messerschmidl*, 191 Kan. 461, 382 P.2d 304 (1963), precede *Yeager* and the adoption of the *Yeager* Rule, which explains why the claimant never asserted the *Yeager* Rule. Moreover, the Insurance Companies falsely represent that "*Rex v. Warner*, 183 Kan. 763, 332 P.2d 572 (1958) is a case improperly relied upon by Plaintiff in opposition to Defendants' assertion of laches as a bar to Plaintiffs claim." *Response*, p. 40. The representation is not true. *See Plaintiff's Motion*, pp. 35-37. After discussing *Rex*, the Insurance Companies falsely accuse plaintiff of confusing laches with equitable estoppel *in pais. Response*, pp. 40-41.

The Insurance Companies' reliance on *Haas v. Preferred Risk Mut. Ins. Co.*, 214 Kan. 747, 522 P.2d 438 (1974), is misplaced. *See Response*, pp. 42-43, In *Haas*, the Supreme Court ruled the evidence was sufficient to support the finding of the trial court that the insured's conduct, resulting in his injury, had been intentional, excluding coverage. The word "laches" is not even used in the case.

The Insurance Companies make no attempt whatsoever to challenge either *Jennings* or *Boucek*. However, their final argument is a challenge to *Yeager*, which seriously misses the mark. *Response*, p. 42. In *Yeager*, plaintiff sought an accounting for her share of oil and gas royalties from an oil and gas lease located in Oklahoma. *Yeager, supra*, 205 Kan. at 505 ("[I]n this lawsuit, the plaintiff, M. P. Yeager, who owns an interest in an overriding royalty, seeks and accounting from the defendant... for a share of the oil produced" and purchased by defendant); at 507 ("[t]he present action for an accounting was commenced against N.C.R.A. July 20. 1966"). [7] The trial court granted Mrs. Yeager judgment against NCRA, but reserved questions relating to the accounting itself pending the appeal. *Yeager, supra*, 205 Kan. at 505, 507. On appeal, NCRA argued plaintiff's claim was barred by *the* statute of limitations. *Id.* at 507 ("On the present appeal, the defendanty(3)27 advance these arguments: (1) That plaintiff's claim is barred by the statute of limitationsy(3)27."). The Court first addressed "defendant's contention that the plaintiffs claim is barred by the statute of limitations." *Id.* at 508. The Court agreed that, if there is no applicable statute of limitations, then laches applies:

"[Plaintiff argues] that in a purely equitable action for an accounting, where there is no corresponding legal right or remedy, the statute of limitations does not apply at all; that the doctrine of laches, alone, will defeat the cause of action. We find no great fault with these assertions as abstract statements of law, but believe they have no application here.

Yeager, supra, 205 Kan. at 509. However, if a statute of limitations applies to the claim, then laches does not apply.

In our view of the circumstances attending the instant case, Mrs. Yeager did have a corresponding legal remedy; she might have sued to recover damages for N.C.R.A.'s alleged interference with her assignor's efforts to obtain a valid lease. The rule set forth in 30A C.J.S. Equity s 131, p. 90, is pertinent:
'Where there is a corresponding legal right or remedy, (as we believe there is here) although equity may have exclusive jurisdiction over the enforcement of the right, courts of equity ordinarily will apply the statute of limitations by analogy * * *."'

Yeager, supra, 205 Kan. at 509. Because a two-year statute of limitations applied to plaintiff's claim, laches had no relevance:

"We are forced to conclude that the doctrine of laches has no relevance to the facts in this case, but that the two-year statute of limitations applies. Mrs. Yeager must have commenced this lawsuit within two years from the time her asserted cause of action accrued."

Yeager, supra, 205 Kan. at 510.

Under *Yeager*, laches has no application, even in an equitable action, where a statute of limitations applies to a corresponding legal right or legal remedy. Here, a statute of limitations applies to a legal right and a legal remedy. The legal right is breach

of a written settlement agreement, and the legal remedy is the recovery of a money judgment, and the applicable statute of limitations is five years. Under *Yeager*, laches "has no relevance."

The Insurance Companies try to spin *Yeager* as something about "equitable estoppel" and something about a supposed admission by the Mrs. Yeager that "her claims were barred by the two year statute of limitations." *Response*, p. 42. These misstatements are apparent from the parts of the opinion quoted above. Moreover, *Jennings v. Jennings*, 211 Kan. 515, 527, 507 P.2d 241 (1973), applied *Yeager* and refused to let a defendant assert laches because a statute of limitations applied to a corresponding legal right or legal remedy:

"Defendant attempts to apply the rule of *laches* to bar the plaintiffs' cause of action, claiming they should not be allowed to pursue this action by reason of their long delay in asserting their rights. To the contrary is Yeager v. National Cooperative Refinery Ass'n, 205 Kan. 504, 470 P.2d 797. *It was held therein that when a statute fixes a limitation period for a claim asserted in a court of law, a court of equity will by analogy follow statutory limits when the claim is raised in an equitable proceeding rather than applying the doctrine of laches*."

Jennings v. Jennings, supra, 211 Kan. at 527 (underlining added). *See also Boucek v. Boucek*, 297 Kan. 865, 871, 305 P.3d 597 (2013)("When there is no statute of limitations problem, there is little room for application of the equitable doctrine of laches."). *Jennings* and *Boucek* were cited and discussed previously. *See Plaintiff's Motion*, p. 36. Sensing no way around the very clear pronouncement of those two opinions, the Insurance Companies do not challenge them beyond falsely asserting that they involved "equitable estoppel." *See Response*, pp. 36-43.

Moreover, recently, the Court of Appeals applied the *Yeager* rule to the limitations period for filing motions to withdraw pleas after sentencing, and ruled that, because a limitations statute governed the filing of such motions, consideration of laches was not appropriate:

We also note that effective April 9, 2009, the Kansas Legislature enacted a new 1-year statute of limitations for filing motions to withdraw pleas after sentencing. K.S.A.2010 Supp. 22-3210(e). *Because the statute governing motions to withdraw pleas after sentencing now contains an explicit time limitation to file such a motion, any consideration of the equitable doctrine of laches no longer appears to be necessary or appropriate in determining whether a motion to withdraw plea should be granted.* See *Yeager v. National Cooperative Refinery Ass'n*, 205 Kan. 504, 510, 470 P.2d 797 (1970) (doctrine of laches has no relevance where 2-year statute of limitations applies).

State v. Chavez-Aguilar, 2011 WL 6382742, *11 (Kan.App., December 16, 2011) (unpublished opinion)(attached, *Exhibit* 53) (underlining added). *See also Clark v, Amoco Production Co.*, 794 F.2d 967, 972 (5th Cir. 1986)("the doctrine of laches is inapplicable to an action that comes within the provisions of a particular statute of limitations"); *FDJC v. Niblo*, 821 F.Supp. 441, 451 (N.D.Tex. 1993)("the doctrine of laches is inapplicable to an action that conies within the provision of a particular statute of limitations").

In this case, Judge Lahey has already adopted the *Yeager* rule and has already ruled that laches has no application to plaintiff's claim. After plaintiff filed this motion for summary judgment, the issue of whether laches does or does not apply in this case, given that a statute of limitations applies, was raised and decided by Judge Timothy Lahey. *Plaintiffs Exhibits* 44-46. In connection with a motion to quash a deposition subpoena in which plaintiff sought to bar defendants' attorney from taking the deposition of plaintiffs attorney, Ron D. Beal, defendants' attorney argued that information possessed by plaintiff's attorney was relevant to their affirmative defense of laches. *Plaintiffs Exhibit* 44, pp. 5-6. Plaintiff argued that, under Kansas law, because a statute of limitations applied to his claim, laches had no application. *Plaintiff's Exhibit* 45, pp. 7-9. Plaintiff said as follows:

Defendants explain that the information sought is relevant to their affirmative defense of laches. *Defendants' Response*, pp. 5-6. That explanation proves that the information is not relevant. As a matter of law, laches has no application to plaintiff's contract claim.y(3)27 Under Kansas law, when a statute has fixed a limitations period under which the claim would be barred if

interposed in a court of law, courts follow the limitations provided by law and laches has no application. *Jennings v. Jennings*, 211 Kan. 515, 527, 507 P.2d 241 (1973); *Yeager v. National Cooperative Refinery Ass'n, 205* Kan. 504, 509, 470 P.2d 797 (1970)(doctrine of laches has no relevance where 2-year statute of limitations applies).

Plaintiff's Exhibit 45, pp. 7-8. *See also Plaintiff's Exhibit* 45, pp. 8-9.

Judge Lahey agreed with plaintiff's argument and granted the motion to quash the deposition subpoena:

The Court: Okay. Tell me what cases you have where a statute of limitations applies and latches [sic] was a successful defense? They've cited two cases where the court pretty clearly suggest you are not going to have a latches [sic] defense if you've got an applicable statute of limitations.

* * *

The Court: Well, tell me the sense it would make we have a statute of limitations and you want to raise a latches [sic] defense when the claim is brought within the statute of limitations? How does that make sense in the context of how the system is set up?

* * *

Mr. Hummer: ... They are contending the five year applies. If that five year applies we're contending that they are still barred by latches [sic].

The Court: Okay., I get that. I wanted to know what sense that makes. I don't understand the rationale why that would even make sense ...

* * *

The Court: All right.

I will order the subpoenas quashed pursuant to 60-245 C.y(3)27.

* * *

I don't think the information is relevant because this case has an applicable statute of limitations. I'm not aware ... Of a case where latches [sic] was successfully argued or applied in a case where a statute of limitations has been established by the legislature as is the case here.y(3)27

This is a contract case.y(3)27 And since latches [sic] is not relevant that information can't be crucial so I'm granting the motion for those reasons as well.

Plaintiff's Exhibit 46, pp. 12/14-19; 13/5-9; 13/25-14/7; 17/17-19; 18/6-19.

There is no reason for conflicting rulings between district judges on this issue. Kansas law is clear. Because a statute of limitations applies, laches has no application.

B. The Insurance Companies Have Failed To Come Forward With Evidence Of the Essential Elements of Laches.

On their affirmative defense of laches, if the Insurance Companies cannot make a showing sufficient to establish the existence of the essential elements of their affirmative defense on which they will bear the burden of proof at trial (which they cannot), then summary judgment for the movant is appropriate:

"In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof."

Crooks v. Greene, 12 K.A.2d 62, 64, 736 P.2d 78 (1987). *See Dozier v. Dozier*, 252 Kan. 1035, 1041, 850 P.2d 789 (1993)(If the nonmoving party does not sufficiently establish an essential element of its case on which he or she has the burden of proof, the moving party is entitled to summary judgment.); *State ex rel. Stovall* v. *Meneley*, 271 Kan. 355, 389, 22 P.3d 124 (2001)(party asserting affirmative defense bears burden of proof); *Kastner v. Blue Cross & Blue Shield of Kansas, Inc.*, 21 Kan.App.2d 16, 22, 894 P.2d 909, *rev. denied* 257 Kan. 1092 (1995)(If the moving party is able to show a lack of evidence to support any single element of the nonmoving party's affirmative defense, then summary judgment is appropriate.)

The Insurance Companies have failed to satisfy their burden of coming forward with evidence of each essential element of their laches defense. The Insurance Companies have

(1) failed to satisfy their initial burden of showing evidence of neglect on the part of plaintiff to assert his breach of contract claim, *infra*, pp. 52-54;

(2) failed to satisfy their initial burden of showing evidence that the lapse of time was unreasonable and unexplained, *infra*, pp. 54-57;

(3) failed to satisfy their initial burden of showing evidence that the insurance companies were misled by the lapse of time; *infra*, pp. 57-58; and

(4) failed to satisfy their initial burden of showing evidence the insurance companies were prejudiced by the lapse of time, *infra*, pp. 58-59.

1. The Insurance Companies have failed to come forward with evidence of neglect of the part of plaintiff.

The Insurance Companies quote Kansas case law stating that laches "is defined as *neglect to assert a right or claim* which, taken together with the lapse of time and other circumstances causing prejudice to the adverse party ... *Response*, p. 39 (underlining added). The Kansas case law on which the Insurance Companies rely makes clear that an essential element of laches is neglect to assert a claim.

The Insurance Companies have failed in their burden to come forward with evidence of neglect by plaintiff to assert his claim for breach of contract. *Response*, pp. 36-43. Indeed, they do not even use the word "neglect," much less argue the existence of neglect. *Id.*

To the contrary, the evidence proffered by the Insurance Companies shows there was no neglect to assert the breach of contract claim. Numerous entries in the Claim Activity Report *(Response Exh.* L) show that, upon learning plaintiff would not be paid the full $25,000 amount, Mr. Wiechman immediately asserted plaintiff's claim for breach of contract by threatening a lawsuit and demanding payment of $25,000. *Response Exh.* L. The following are several examples of the entries:

1. An entry on October 1, 2008, states that, on September 26, 2008, Mr. Wiechman demanded payment of $25,000, and that he would "sue" if defendants failed to make payment.

2. An entry on October 16, 2008, states that Mr. Wiechman, again, informed defendants that he would file a lawsuit.

3. An entry on February 25, 2009, states that Mr. Wiechman, again, informed defendants that he was filing a lawsuit "for failing to honor our agreement."

Response Exh. L, pp. 44-46. Thereafter, Mr. Wiechman continued his demands for payment of $25,000:

4. On May 11, 2012, Mr. Wiechman, again, made demand on defendants for payment of $25,000.

5. On June 6, 2012, Mr. Wiechman, again, made demand on defendants.

6. On June 19, 2012, Mr. Wiechman, again, made demand on defendants for payment of $25,000.

Response Exh. L, pp. 48, 50-51. The Insurance Companies were on notice of both the adverse claim and the prospective lawsuit,

By February 2009 (if not earlier), the Insurance Companies had hired and were consulting with a lawyer. *Response Exh*. L, p. 46. Their lawyer authored letters on the threatened lawsuit. *Facts* ¶24. Their lawyer could have filed a lawsuit for rescission or reformation or declaratory judgment, but chose not to. Their lawyer could have taken Avery's statement. They obviously spoke with Avery. It is likely Avery's recitation of what happened did not help defendants' legal position, so defendants chose no to record her statement. That is on the Insurance Companies and their lawyer, not plaintiff. The Insurance Companies say that, in August 2011, Avery left the employ of CPI. If they failed to keep track of Avery's whereabouts, that neglect is on the Insurance Companies and their lawyer, not plaintiff.

The Insurance Companies have failed in their burden to come forward with evidence of neglect to assert the right or claim. For this reason alone, laches does not preclude summary judgment for plaintiff.

2. The Insurance Companies have failed to come forward with evidence that the lapse of time was unreasonable and unexplained.

The Insurance Companies quote Kansas case law stating that the neglect must be "for an *unreasonable* and *unexplained* length of time, under circumstances permitting diligencey(3)27." *Response*, p. 39 (underlining added). In *Osincup v. Henthom*, 89 Kan. 58, 130 P. 652 (1913), to which the Insurance Companies cite, *see Response*, p. 39, the Court ruled that laches will not bar a recovery where there is a reasonable excuse for nonaction of a party. The Kansas case law on which the Insurance Companies rely makes clear that an essential element of laches is that the lapse of time must be "unreasonable" and "unexplained."

The Insurance Companies have failed to satisfy their initial burden of showing evidence that the lapse of time was both "unreasonable" and "unexplained." *See Response*, pp. 36-43. To the contrary, the evidence proffered by the Insurance Companies shows that the lapse of time was neither unreasonable nor unexplained. They proffered the deposition testimony of Mr. Wiechman who testified that:

a. there was a possibility that Mr. Wiechman may be a witness in the case and his attorney of choice and plaintiffs attorney of choice was Ron Beal, who was involved in a major malpractice lawsuit against a Kansas City law firm in Butler County, *Response Exh*. K, pp. 73/18 - 74/6, 74/10-11;

b. Mr. Beal informed Mr. Wiechman that he was unable to take this case, and it was not until March 2013 that he was free to take this case, *Id.* at 74/6-9;

c. Mr. Wiechman was not familiar with any Wichita lawyer he believed was capable of prosecuting the case to the extent that Mr. Ron Beal would be in representing plaintiff, *Id.* at 74/12-18;

d. there were no lawyers in Wichita which Mr. Wiechman felt were capable of filing and pursuing competently a contract action against the defendants to the extent that Mr. Beal is capable and competent, *Id.* at 75/17-23;

e. the preference of Mr. Wiechman "was to have Mr. Beal and Mr. Beal alone do this, absolutely." *Id.* at 75/24 - 76/3;

f. Mr. Wiechman did not file this action prior to March 2013 because Mr. Beal was not available, *Id.* at 76/4-9;

g. Mr. Wiechman did not file this action within a couple of years post-September 2008 because he knew he had to get Mr. Beal involved shortly after filing, and Mr. Beal was not available, *Id.* at 76/10-21.

The Insurance Companies admit the lapse of time "was purely Plaintiff's intentional choice based on a 'preference' for an attorneyy(3)27." *Response*, p. 46. They criticize plaintiff's exercise of his right to employ his counsel-of-choice. However, they cite no legal authority whatsoever holding that filing an action within the applicable statute of limitations, but waiting until the party's counsel-of-choice is available, is unreasonable for purposes of laches. *Id.* at 36-43.

The exercise of plaintiff's right to his or her attorney of choice is not unreasonable. Kansas law respects the right of a party to select an attorney of choice. For example, in evaluating motions to disqualify, courts consider the right of a party to be represented by counsel of choice, and consider that right an important one: "[t]he right to be represented by counsel of choice is an important one, subject to override only upon a showing of compelling circumstances." *Quality Developers, Inc. v. Thorman*, 29 Kan.App.2d 702, 711, 31 P.3d 296 (2001), quoting *LeaseAmerica Corp. v. Stewart*, 19 K.A.2d 740, 750, 876 P.2d 184 (1994). *See also Associated Wholesale Grocers, Inc. v, Americold Corp.*, 266 Kan. 1047, 1057, 975 P.2d 231 (1999)("The right to be represented by counsel of choice is an important one, subject to override only upon a showing of compelling circumstances."). That right is frequently discussed in connection with motions to disqualify the attorney for a party, which make clear that a party litigant in a civil proceeding has a fundamental right to employ and be heard by counsel of his or her choosing:

[A] party litigant in a civil proceeding still has a fundamental right to *employ* and be heard by counsel of his or her own choosing. The right to select counsel without state interference is implied from the nature of the attorney-client relationship in our adversarial system of justice, where an attorney acts as the personal agent of the client and not the state. It is also grounded in the due process right of an individual to make decisions affecting litigation placing his or her property at risk. An individual's decision to employ a particular attorney can have profound effects on the ultimate outcome of litigation. Legal practitioners are not interchangeable commodities. Personal qualities and professional abilities differ from one attorney to another, making the choice of a legal practitioner critical both in terms of the quality of the attorney-client relationship and the type and skillfulness of the professional services to be rendered. (Citations omitted).

Arkansas Valley State Bank v. Phillips, 171 P.3d 899, 904-05 (Okla. 2007).

In this case, Judge Vining has already stated that "I consider quite clearly the choice of counsel as a paramount virtue of a litigant. It has to be given great weight." *Plaintiff's Exhibit* 47, p. 47/21-23.

The reasonableness of the nonaction is given broad leeway. In *Moore v. Phillips*, 6 Kan.App.2d 94, 627 P.2d 831 (1981), from which the Insurance Companies quote extensively, *see Second Amended Motion*, p. 22, the Court affirmed the rejection of the defense of laches by the district court because the reason for nonaction was not unreasonable, and because there was no prejudice. *Moore*, 6 Kan.App.2d at 98-99. The remaindermen brought an action against the estate of the life tenant to recover damages for deterioration of a farmhouse resulting from neglect of the life tenant. *Id.* at 94. Over an 11 year period, the remaindermen had expressed concern about the deterioration of the property, but filed no action until after the life tenant passed away. *Id.* at 96. The remaindermen explained the reason for the lapse of time, and the explanations was not unreasonable. The life tenant

was an **elderly** woman; she died at the age of 83. *Id.* at 99. The remaindermen, the estranged daughter of the life tenant, did not wish to aggravate her mother and take funds which her mother might need during her lifetime. *Id.* Under these circumstances, the 11 year lapse of time was not unreasonable; laches did not require the remaindermen to file an action during the lifetime of the remaindermen. *Id.*

Plaintiff has explained the lapse of time, and the Insurance Companies have failed in their burden to come forward with evidence that the lapse of time was unreasonable and unexplained. For this reason alone, laches does not preclude summary judgment for plaintiff.

3. The Insurance Companies have failed to come forward with evidence they were misled by the lapse of time.

The Insurance Companies quote Kansas case law stating "mere lapse of time alone does not constitute laches but if delay has *misled* other parties to their prejudice, the bar of laches may be invoked." *Response*, p. 39 (underlining added). In *Calkin v. Hudson*, 156 Kan. 308, 133 P.2d 177 (1943), to which the Insurance Companies cite, *Response*, p. 39, the Court stated mere lapse of time does not constitute laches; rather, the delay must have misled the adverse parties to their prejudice. *Calkin v. Hudson, supra*, 156 Kan. at 318. The Kansas case law on which the Insurance Companies rely makes clear that an essential element of laches is that the lapse of time must have misled other parties.

The Insurance Companies have failed to satisfy their initial burden of showing evidence that the lapse of time misled the Insurance Companies. *Response*, pp. 36-43. To the contrary, the evidence proffered by the Insurance Companies shows the lapse of time did not mislead them. The Claim Activity Report contains no entry to the effect that defendants were misled by the lapse of time. *Response Exh*. L. Defendants had notice of plaintiff's demand for payment of $25,000, and they had notice of plaintiff's threat to file a lawsuit. Moreover, the Insurance Companies make no showing that Avery's departure was on account of plaintiff having not filed this action by August 2011, or on account of plaintiff having somehow misled defendants.

4. The Insurance Companies have failed to come forward with evidence they were prejudiced by the lapse of time.

The Insurance Companies quote Kansas case law stating "mere lapse of time alone does not constitute laches but if delay has misled other parties *to their prejudice*, the bar of laches may be invoked." *Response*, p. 39 (underlining added). The Kansas case law on which the Insurance Companies rely makes clear that an essential element of laches is that the lapse of time must have misled other parties to their prejudice.

The Insurance Companies neither argue that they were prejudiced nor show how they were prejudiced. *Response*, pp. 38-43.

In their Second Amended Motion For Summary Judgment, the Insurance Companies argued that they were prejudiced in three respects; (1) incurring prejudgment interest, (2) the absence of Avery to testify "about oral negotiations that could reduce the statute of limitations to 3 years," and (3) the expense of traveling to California "if Avery could be found to depose her when she could have been deposed up to the time she left CPI's employment on August 11, 2011y(3)27." *Second Amended Motion For Summary Judgment*, pp. 24-25. However, in his response, plaintiff showed that the Insurance Companies had failed to satisfy their initial burden of showing evidence of prejudice. *Plaintiff's Response In Opposition To Second Amended Motion For Summary Judgment*, pp. 58-62. For these same reasons, the Insurance Companies have failed to come forward with evidence showing prejudice.

IV. THE AFFIRMATIVE DEFENSE OF ESTOPPEL DOES NOT PRECLUDE THE ENTRY OF SUMMARY JUDGMENT FOR PLAINTIFF.

There exists no legal authority whatsoever protecting insurance companies from settlement agreements into which they have freely and voluntarily entered even if the aggregate total amount (settlement amount plus previously paid amount on subrogation

demand) exceeds the policy limits. The public policy of Kansas favors freedom to contract, which Kansas law describes as "paramount." *Heartland Surgical Specialty Bosp., LLC v. Reed*, 48 Kan.App.2d 237, 244, 287 P.3d 933 (2012)("[T]he paramount public policy is that freedom to contract is not to be interfered with lightly.").

"Courts have the duty to sustain the legality of a contract-in whole or in part when the contract was fairly entered into and it is reasonably possible to do so, rather than seeking loopholes and technical legal grounds for defeating the contract's intended purpose."

Wichita Clinic, P.A. v. Louis, 39 Kan.App.2d 848, 852, 185 P.3d 946 (2008). Moreover, the "strong policy" of Kansas is that "settlements are to be encouraged" and that "the law encourages settlement." *Bright v. LSI Corp.*, 254 Kan. 853, 858, *869* P.2d 686 (1994)("LSI's contentions are contrary to our strong policy that settlements are to be encouraged. We have repeatedly affirmed the principle that the law encourages settlement.") *See Ellis v. Union Pacific R.R. Co.*, 231 Kan. 182, 192, 643 P.2d 158 (1982)("Settlements are favored in the law."); *Eggleston v. State Farm Mutual Auto. Ins. Co.*, 21 K.A.2d 573, 574, 906 P.2d 661 (1995)("[T]he law favors the settlement of disputes."). "It is an elemental rule that the law favors compromise and settlement of disputes, and generally, in the absence of bad faith or fraud, when parties enter into an agreement settling and adjusting a dispute, neither party is permitted to repudiate it." *Krantz v. University of Kansas*, 271 Kan. 234, 241-42, 21 P.3d 561 (2001). *See Lewis v. Gilbert*, 14 K.A.2d 201, 202, 785 P.2d 1367 (1990) ("The law favors the compromise and settlement of disputes, and when parties, in the absence of any element of fraud or bad faith, enter into an agreement settling and adjusting a dispute, neither party is permitted to repudiate it.").

The Insurance Companies cannot explicitly ask to be relieved of their agreement. So they implicitly ask to be so relieved in an asymmetric, incongruent estoppel defense — an argument which is out of place and has no application to an action to enforce a settlement agreement. In a section titled "Requiring an insurer to pay more than [sic] policy limits," the Insurance Companies confuse plaintiffs action to enforce a settlement agreement with actions to enforce an insurance agreement using an estoppel argument. *Response*, pp. 33-36.

A. The Estoppel Defense Is An Affirmative Defenses That Has Been Waived Because It Was Not Pled In Defendants' Joint Answer.

The estoppel defense raised by the Insurance Companies is an affirmative defense. It was not pled. *See* Joint Answer of Defendants to Amended Petition. Affirmative defenses that are not pled are waived. *Kansas Health Care Stabilization Fund. v. Si. Francis Hospital*, 41 K.A.2d 488, 502, 203 P.3d 33 (2009), *rev. denied* 289 Kan. 1279 (2010); *In re Parentage of Shade*, 34 K.A.2d 895, 903-04, 126 P.3d 445, *rev. denied* 281 Kan. 1378 (2006). Accordingly, the estoppel defense has been waived.

B. The Estoppel Defense Should Be Rejected Because It Was Not Disclosed In Response To Plaintiff's Interrogatories.

In interrogatories, defendants were asked to fully disclose any other defenses (which had not been pled). *Plaintiff's Exhibits* 30-32, Nos. 15 and 16. Defendants failed to disclose the estoppel defense. *Plaintiff's Exhibit* 33, Nos. 15 and 16.

The Court has discretion to exclude testimony from a witness who is not properly identified during discovery or in pretrial order. *West v. Martin*, 11 Kan.App.2d 55, Syl. ¶1, 713 P.2d 957 (1986). It follows, then, that the Court has discretion to disregard a defense that was not properly disclosed in discovery. Otherwise, litigants would have every incentive to conceal their defenses and perpetuate discovery **abuse**. Accordingly, the Court should exercise its discretion and reject these defenses for failure to comply with the discovery obligations.

C. This Action Is To Enforce A Settlement Agreement, Not To Enforce the Insurance Agreement Between the Insurance Companies and Their Insured By Use Of An Estoppel Argument.

The Insurance Companies say "waiver and estoppel cannot be used to expand coverage under a liability insurance policy." *Response*, p. 33. Of course, plaintiff is neither using waiver/estoppel nor suing under the insurance agreement.[8] In the cases on which the Insurance Companies rely, there was no settlement agreement, and the parties were not seeking to enforce a settlement agreement entered by an insurance company.

For example, the Insurance Companies quote a passage from *Brown* which discusses *Western Food (Response*, p. 34-35), where the insured brought an action against the insurer to recover the policy proceeds for the destruction of an airplane. *Western Food*, 10 Kan.App.2d at 375 The district court granted summary judgment to the insurer and the insured appealed. *Id.* At 376 A provision in the insurance policy required the pilot to have a valid medical certificate, and the insured admitted the pilot did not have a current medical certificate. *Id.* at 376, 377. The insured argued the insurer was estopped from denying coverage because of implied knowledge. *Id.* at 381. The Court of Appeals applied the general rule that waiver and estoppel cannot be used to expand the scope of an insurance contract. *Id.* at 381. The Court affirmed the ruling of the district court. *Id.*

The Insurance Companies stress that *Western Food* "is still good lawy(3)27." *Response*, p. 35. Maybe, but it does not help the Insurance Companies. Plaintiff is an injured party, not the insured. Plaintiff seeks to recover under the settlement agreement of the Insurance Companies, not under an insurance agreement to which plaintiff is not a party. Plaintiffs theory of recovery is breach of the settlement agreement; not waiver or estoppel.[9] *Western Food*, and the other cases on which the Insurance Companies rely, have no application to this case.

Again, there is no legal authority whatsoever protecting insurance companies from settlement agreements into which they have freely and voluntarily entered even if the aggregate total amount (settlement amount plus previously paid amount on subrogation demand) exceeds the policy limits. The Insurance Companies were free to agree to pay $25,000 to plaintiff notwithstanding its prior payment of the subrogation demand. The settlement fostered the expressed interest of the Insurance Companies to resolve the personal injury claim without incurring additional legal expenses.

V. PLAINTIFF IS ENTITLED TO PREJUDGMENT INTEREST.

Plaintiff previously showed that both the amount due ($25,000) and the date on which such amount was due (August 26, 2008) are fixed and certain, so the claim is liquidated and plaintiff is entitled to recover prejudgment interest under K.S.A. 16-201. *Plaintiff's Motion*, pp. 37-38. Also, plaintiff previously showed that, under Kansas case law, the recovery of prejudgment interest on an unliquidated claim is permitted where necessary to fully compensate a party. *Plaintiff's Motion*, pp. 38-39.

In response, the Insurance Companies begin by arguing that the $25,000 amount which they owe is not liquidated, and they rely on a passage from *Argora*, an unpublished decision of the Tenth Circuit Court of Appeals. *Response*, p. 43. In *Argora*, a commercial tenant (Foulston) signed a lease agreement for a five year term, which included two riders, the second of which included terms by which Foulston could opt to renew. *Argora*, 70 Fed.Appx. at 990-91. Significantly, the rider did not set a specific rental figure; rather, it provided that the renewal rental rate would be "at market rate for comparable space in the Fourth Financial Center." *Id.* at 991. When Foulston renewed, the parties disagreed on the market rate for comparable space in the Center. *Id.* at 992. Foulston filed the action seeking a declaratory judgment of the amount due under the renewal clause, a return of the overpaid amount pending the outcome of the litigation, and prejudgment interest on the overpaid amount. *Id.* at 992. The district court sided with the landlord and denied Foulston prejudgment interest on the amount overpaid. *Id.* at 992-3. Foulston appealed and the Tenth Circuit affirmed. *Id.* at 993, 998. On the issue of prejudgment interest on the overpaid amount, the Court raised "the general rule that an unliquidated claim for damages does not draw interest until liquidated ..." *Id.* at 997. The Court stated that the amount Foulston overpaid "was not liquidated until judgment" and "[t]he sum of money Argora owed Foulston was unknown until entry of judgment." *Id.* at 998.

Argora has no application to this case. In *Argora*, there was no written settlement agreement or other contract specifically stating the amount owed. The Release Of All Claims does not say that the consideration for the release shall be at "market rate." The

Release specifies a set amount owed plaintiff- $25,000. There is no dispute as to, and a trial is not necessary to determine, the number of dollars that must be paid to reach $25,000. Here, the amount owed is specified and liquidated. The $25,000 amount owed to plaintiff has been known since August 26, 2008 - when plaintiff accepted defendants' settlement proposal by delivering to defendants their standard form Release, properly signed and notarized.

Recognizing the $25,000 amount owed is a liquidated amount, the Insurance Companies shift gears and quote a passage from *Crawford v. Prudential Ins. Co.*, 13 Kan.App.2d 452, 773 P.2d 678 (1989), stating that "prejudgment interest is not proper where a bona fide dispute between the parties exists," and they argue that a bona fide dispute exists here. *Response*, p. 45. The Insurance Companies do not disclose to the Court that the Kansas Supreme Court reversed the Court of Appeals' decision in *Crawford* and allowed prejudgment interest. *See Crawford v. Prudential Ins. Co.*, 245 Kan. 724, 783 P.2d 900 (1989). The Court stated that the existence of a good faith controversy does not preclude an award of prejudgment interest:

"The fact that a good faith controversy existed as to [insurance] coverage which precludes the allowance of attorney fees does not necessarily preclude the granting of prejudgment interest in a case of this type.

In *Friedman v. Alliance Ins. Co.*, 240 Kan. 229, 729 P.2d 1160 (1986), this court upheld an award of prejudgment interest on an undisputed portion of an insured's claim, despite the denial of attorney fees because of a good faith question of coverage. 240 Kan. at 239, 729 P.2d 1160. The same result was reached in *Harper v. Prudential Ins. Co. of America*, 233 Kan. 358, 662 P.2d 1264 (1983). The court rejected an award of attorney fees because of a bona fide question concerning the insurer's failure to pay the claim. Nevertheless, the court found the amount of insured's claim was liquidated and found no error in the trial court's award of interest. 233 Kan. at 372-73, 662 P.2d 1264.

Crawford v. Prudential Ins. Co., supra, 245 Kan. at 737.

The Insurance Companies ignore that, after *Crawford*, the Kansas Supreme Court has repeatedly ruled that a good faith controversy does not preclude granting prejudgment interest on a liquidated claim. *See Owen Lumber Co. v. Chartrand*, 283 Kan. 911, 926, 157 P.3d 1109 (2007)(affirmmg judgment for prejudgment interest, recognizing that prejudgment interest is allowable on liquidated claims, and stating "it remains true that a good faith controversy ... does not preclude the granting of prejudgment interest on a liquidated claim"); *Varney Business Services, Inc. v. Pottroff*, 275 Kan. 20, 44, 59 P.3d 1003 (2002)(affirming judgment for prejudgment interest, recognizing that prejudgment interest is allowable on liquidated claims, and stating "the fact that a good-faith controversy exists as to whether the party is liable for the money does not preclude a grant of prejudgment interest"); *Blair Const., Inc. v. McBeth*, 273 Kan. 679, 689, 44 P.3d 1244 (2002)(afrirming judgment for prejudgment interest, recognizing that prejudgment interest is allowable on liquidated claims, and stating "the fact that a good-faith controversy exists as to whether the party is liable for the money does not preclude a grant of prejudgment interest"); *Miller v. Botwin*, 258 Kan. 108, 119, 899 P.2d 1004 (1995)(same). *See also Hysten v. Burlington Northern Santa Fe Ry Co.*, 530 F.3d 1260, 1280 (10th Cir. 2008)(under Kansas law, in assessing the propriety of awarding prejudgment interest, "it is irrelevant that the underlying liability is disputed").

Recovery of interest on a liquidated claim is not precluded simply because the defendant has alleged defenses. A contrary rule would motivate insurance companies to assert unmeritorious defenses for no other reason than to avoid paying interest.

Defendant has had the use of the $25,000 settlement proceeds for six years, and has probably received a rate of return on the investment of the funds in excess of 50%. *See Plaintiff's Response To Second Amended Motion For Summary Judgment*, p. 59. Defendants could have avoided paying interest by paying plaintiff in 2008 as they agreed to do, or by tendering the settlement proceeds into the Court, but they refused to honor the settlement agreement which they prepared using their own standard form. Indeed, by their own admission, at least $17,964.85 should have been paid to plaintiff six years ago. Awarding interest will discourage insurance companies from **abusing** their position and refusing to honor their settlements agreement. Not awarding interest will motivate insurance companies to refuse to honor settlements agreements into which they freely and voluntarily enter.

VI. THE INSURANCE COMPANIES STATE THAT THEY HAVE ABANDONED CERTAIN DEFENSE.

A. The Settlement Agreement Is Supported By Consideration.

Plaintiff previously showed that defendants alleged the settlement agreement lacks consideration; that defendants are wrong, and that the settlement is supported by consideration. *Plaintiff's Motion*, pp. 23-25.

In response, the Insurance Companies say "[t]he issue of lack of consideration is abandoned by Defendants." *Ins. Cos. Resp.*, p. 31. Accordingly, summary judgment should be granted to plaintiff on the issue of whether the settlement agreement is supported by consideration.

B. Plaintiff's Claim Is Not Barred By Mistake.

Plaintiff previously showed that, for multiple reasons, plaintiff's claim is not barred by the doctrine of mistake. *Plaintiff's Motion*, pp. 27-35.

In response, the Insurance Companies say "**Mistake**. Defendants abandon this defense ...." *Response*, p. 33 (emphasis in original). Later, to emphasize the point, the Insurance Companies say "**MISTAKE**. Defendants withdraw this defense ...." *Response*, p. 36 (emphasis in original). Accordingly, summary judgment should be granted plaintiff on the issue of mistake.

VII. MISCELLANEOUS

The Insurance Companies reference an off-hand comment of Judge Tim Lahey, and they advance to the Court a known falsehood - that this case "is a dispute over about $7,000y(3)27." *Response*, p. 1. They describe plaintiffs claim as "this molehill." *Response*, p. 1.

Plaintiff seeks to recover the contract amount of $25,000 plus prejudgment interest accruing at the rate of 10% per annum since August 26, 2008, the aggregate total of which exceeds $39,750. The dispute exceeds $39,750 and is not "over about $7,000." That the Insurance Companies would advance a known falsehood to defend against a case they consider to be a "molehill" is telling.

CONCLUSION

Plaintiff respectfully requests the entry of summary judgment for plaintiff and against the defendants.

Respectfully submitted,

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Appendix not available.

Footnotes

1 Exhibits A through EE accompany the "*Response of Defendants Benchmark Insurance Company and Claims Professionals, Inc. To Plaintiff's Motion For Partial Summary Judgment*." Those exhibits are different from Exhibits A through DD which accompany "*Defendants' Second Amended Motion For Summary Judgment.* " Both sets of exhibits are different from Exhibits A through X which accompany *"Defendants' Amended Motion For Summary Judgment*" which defendant Huddleston adopted in part.
For clarity, Exhibits A through EE are referred to herein as "*Response Exh* " Exhibits A through DD are referred to herein as "*Ins. Cos. Exh.*" Exhibits A through X are referred to herein as "*Defendant's Exh.*"

2 *Plaintiff's Exhibits* 1-34 accompanied plaintiffs motion for summary judgment. *Plaintiff's Exhibits* 35-50 accompanied plaintiff's response to the Second Amended Motion For Summary Judgment of defendants Benchmark Insurance Company ("Benchmark Insurance") and Claims Professionals, Inc. ("CPI") (collectively "the Insurance Companies"). Plaintiff's Exhibits 51-53 accompany this Reply In Support of Plaintiff's Motion For Summary Judgment.

3 The deposition was taken on July 30, 2013. *Response Exh*. K, p. 1.

4 Plaintiff was required to make this showing because, in their answer, defendants denied the allegation that plaintiff accepted the settlement offer, and denied that plaintiff signed the release and faxed it back to defendant CPI. *Plaintiffs' Motion*, p. 3. However, the response of the Insurance Companies drops that denial. *Response*, pp. 25-31.

5 Parol evidence is "evidence given orally." *Black's Law Dictionary* 579 (7th ed. 1999).

6 *See Stechschulte v. Jennings*, 297 Kan. 2, 20, 298 P.3d 1083 (2013)("Paragraph 5 operates as an integration clause, protecting a seller from a buyer's later allegation that the seller made representations not committed to writing upon which the buyer relied."); *UAW-GMHuman Resource Ctr. v. KSL Recreation Corp.*, 579 N.W.2d 411, 421 n.14 (Mich.App. 1998)("The raison d'etre of an integration clause is to prohibit consideration of parol evidence by nullifying agreements not included in the written agreement. See 3 Corbin, Contracts, § 578. To consider parol evidence in interpreting a written contract that includes an integration clause is to accord the integration clause no meaning.").

7 The Insurance Companies say *Yeager* "was an oil and gas lease case which, in Kansas, is governed by its own separate set of jurisdiction (See,) [sic]." *Response*, p. 42. They do not explain the "governed by its own separate set of jurisdiction" comment. *Id.*

8 The Insurance Companies deliberately make the following misrepresentation to the Court: "Plaintiff wants this court to apply estoppel to force a payment for coverage Huddleston never had — a policy limit of $32,000," *Response*, p. 35.

9 In other parts of their memorandum, the Insurance Companies admit "[t]his is a [law]suit to enforce an alleged settlement agreementy(3)27." *Response*, p. 1. They admit "[p]laintiff brings this breach of contract casey(3)27." *Id.* at 11, ¶39. They argue that a jury must determine whether the amount of the settlement was $17,864.85 or $25,000. *Id.* at 25-31. The conveniently forget these statements for purposes of their present argument.